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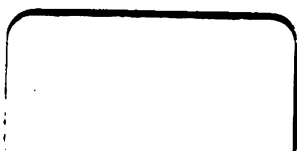
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THE
LAW CHRONICLE:
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CONTAINING

TREATISES ON THE VARIOUS BRANCHES OF THE LAW, NOTES OF LEADING CASES
AND OF STATUTES, SHORT NOTES OF LEGAL NEWS, LEGISLATIVE
MEASURES, AND OTHER MATTERS OF INTEREST
TO THE PROFESSION.

AND

A Complete Summary or Digest of Cases.

BY WHICH THE STUDENT AND PRACTITIONER ARE KEPT COGNISANT OF
THE CHIEF DECISIONS OF THE COURTS.

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CONSOLIDATION OF THE STATUTE LAW.

A new series of resolutions were moved in the House touching the consolidation of the statute law. Mr. L. King, after recapitulating the proceedings, the cost, and the abortive labours of several successive commissions, appointed to investigate the subject, insisted on the necessity of preparing immediately an authentic and expurgated list of the laws now in force, from which the perplexing mass of obsolete, expired, and repealed acts were duly obliterated. He quoted the authority of Lord Lyndhurst for the statement, that, of 16,500 laws still remaining on the Statute Book, no less than 14,000 were defunct, actually or practically; and declared that if the task was consigned to experienced literary hands, a complete and accurate digest of the statutes still in force could be prepared in the course of a few months for a slight expense, and comprised in a book of moderate compass. The Attorney-General remarked upon the magnitude of the task to be accomplished before an accurate digest of the statute law could be prepared. The work, he intimated, was now under investigation by commissioners, whose labours, however, were too recently commenced to afford any practical result which could be used at present. Under these circumstances, he deprecated any interference with the cautions of the commission, from which much good was anticipated. The legal members of the House agreed in the necessity for a consolidation of the law, but did not expect much practical good from the adoption of Mr. King's resolutions, which were, nevertheless, carried by a majority of the House.

FEE IN COUNTY COURTS.

Lord Brougham (June 18) made, in the House of Lords, a statement condemnatory of the excessive fees charged to litigants in the county courts, and complained that the salaries of the judges of these courts should be charged upon the suitors instead of being paid out of the general revenue, as is the case with the judges of the superior courts. The fees levied in the county courts amount to £270,000 a year, while in the superior courts, where the causes tried are more important, and the suitors belong to a class better able to pay, the annual amount of fees is restricted by statute to £50,000. The per centage of fees in the county courts is 17½ per cent. on the amount sued for, and not less than 31 per cent. on the money obtained and paid into court on the proceedings. He cited several instances; in one case, where the amount sued for was £13 or £14, the honest charges, as contradistinguished from the taxes, amounted to £2 16s., and the taxes to

£4 18s. 6d. In another, where the amount sued for was £14 8s. 6d., the taxes were £7 5s. 9d. The last case he mentioned was £5 sued for under the optional clause, and in this case the taxes were £8 being 160 per cent. on the sum sued for. Finally, the learned judge objected to the manner in which judges of the county courts are paid. They are told that they have a right to £1,200 a year, and no less, but that there is an additional sum of £300, which they might or might not be paid at the discretion of the Treasury. According to this system, there are judges who receive £1,350, another class £1,400, and the third class £1,500. Lord Portman said it was prejudicial to the independence of the judges to make the amount of their salary dependant on the will or caprice of the Treasury. The proper course would be to see that the office is fully paid, and then to select the best man to fill it. It must be admitted that the tax on suitors in the county courts is excessive, and that the variety in the salaries paid to the judges is not defensible on principle. It is to be regretted that the subject was allowed to drop. The whole matter is said to be under the consideration of the Government, who have received a report from the commissioners appointed to inquire into the matter.

NEWSPAPER REGULATIONS.

After the 30th newspapers and publications, intended to be posted, must be "folded in such manner that the whole of the stamp denoting the said duty shall be exposed to view, and be distinctly visible on the outside thereof." Periodical publications are to be posted within fifteen days after being published. Newspapers may be registered at the General Post Office, to entitle the same to the privilege of transmission abroad, under treaty with foreign powers.

UNITED LAW CLERKS' SOCIETY.

THE numerous members of the United Law Clerks' Society met at the Freemason's Tavern, on the 13th of June, to commemorate their twenty-third annual festival. They were presided over on the occasion by the Rt. Hon. Lord Justice Turner, supported by the Rt. Hon. Lord Justice Knight Bruce, Sir W. P. Wood, and many of the leading attorneys in London. The annual report, which was read by the secretary, noticed a steady increase of members, the subscriptions last year amounting to £1,200, and the investments on account of the society's capital had increased nearly £2,000, there being now standing to the credit of the society £18,168 19s. 2d. The claims on the superannuation

fund are increasing, there being now seven, requiring a yearly expenditure of £289 4s. Since the last festival ten of the members had died and the families of each had received £50, and five members had each received the sum of £25 on account of the loss of their wives. The chairman, after congratulating the members on the result shown by the report, thought it was the best and most conclusive proof that the society was founded upon a firm, well-considered and well-weighed principal. "We are not," said he, "dealing with hospitals, or schools, or other eleemosynary institutions, each of which has its own merits; but we are to look, on the present occasion, at the peculiar merit of this institution—that it is founded by those and for those who are willing to help themselves, and also willing to extend their aids to others. Upon such principal an institution instantly becomes deserving of the greatest encouragement, and have claims upon the public in general, for they tend most essentially to promote the good conduct of their members good-will and feeling of man towards man." He then spoke of the advantages the bench and bar derived from having honest, well-conducted, affectionate clerks. It is the clerk who, in the middle of the painful duties of the judge, ministers to his comforts; and as to the solicitor, "who does not know," said he "how much of his important business is necessarily entrusted to the clerk, and that what is required to be restrained on such occasions is the eagerness of the clerk to discharge his duty in the absence of the principal. I observe also," added the chairman, "in this report the foundation of a library. We are living in an age of improvements, when every man must cultivate, to the best, those talents with which Providence has endowed him. If ever the time existed when it was necessary for the clerks of solicitors to cultivate their legal knowledge it is the present; for it is impossible for any man not to see that in the changes which are now going on, duties which have heretofore fallen upon the higher branches of the profession must necessarily devolve upon the solicitors, and in their absence must devolve upon the clerk." Finally he urged the importance of increasing the investments.

Mr. Roundell Palmer, M. P., Q. C., in proposing the next toast, "The Lord Chancellor and the other patrons of the society,"—observed that he thought it a most becoming thing that those on whom it had pleased God to confer fortune and prosperity in their common profession should be amongst the most forward to give the sanction of their influence, and the aid of their contributions, to the excellent objects of this society; and the meetings of the society must afford to all a peculiar pleasure, because they must

bring home to all the common duties and interests which unite all, from the highest to the lowest, in one common profession. The union existing between the members of all grades of the profession, was touchingly illustrated by the Scriptures, "We are all members one of another: the head may not say to the hand, I have no need of thee," and even those members who, in popular estimation, may be held less honourable, were in truth among the most honourable, because among the most necessary to all. It was a peculiarly gratifying fact that the patrons of this society, the Lord Chancellor, Lord Lyndhurst, and Lord Truro, were men who had attained to the highest eminence in the profession from no accident of fortune, but of humble origin, had risen by honest industry, integrity, and by that ability which God gives to all in all grades, although not to all alike. The example of Lord Truro was peculiarly remarkable, because he was originally a clerk to a solicitor, as the youngest member of this society might be—afterwards a barrister, and then Lord Chancellor. He was a man who, in the struggle from the lowest to the highest grade, was tried with peculiar and with extraordinary difficulties, but who bore those difficulties from the first to the last with unflinching courage and fortitude, who overcame them all, and who, when he had attained to the highest position, showed that the cheerfulness, the composure and amiability of his disposition had not been ruffled in the least degree by the hardness of the struggle which he had undergone. His was an example which might well be set before the younger members of this society, because his career proved that not only was the road open to all to the highest position, but that there were no difficulties which could prevent a man who possessed energy, honesty, ability and courage from attaining the highest distinction.

The following toasts were proposed by Lord Justice Knight Bruce and Vice Chancellor Wood, in whose opinion, if Russia could boast of a Coke a Somers, or a Hale, we should not be at this time at war with Russia. Sir John Patteson then proposed the "Bench, the Bar, and the Profession."

Mr. Murray returned thanks on behalf of the Profession generally.

Mr. Shebbeare proposed the healths of the "Honorary Stewards," which was responded to by the Master Turner, who said that, from his experience of the clerks, it was impossible for any individuals to conduct themselves more properly than they had done in the transaction of the business which they had to conduct before him.

The healths of the "Trustees," and the "Ladies" having been duly honoured, the Chairman retired at about half-past eleven.

SOLICITORS AND ARTICLED CLERKS

In the recent case of *Dufaur v. Sigel* (4 De Gex, Macn. and Gord. 520) the Court of Appeal in Chancery has given a judgment which concerns all solicitors and their articulated clerks, inasmuch as it is there laid down that the solicitor is bound to see that the articles of the clerk are duly enrolled. The case arose on a claim filed by a solicitor as equitable mortgagee of certain property in respect of the premium payable by the defendant on the latter being articulated to him. The statement in the judgment of the L. J. Bruce will present an accurate view of the facts and decision :—

"The dispute originated and exists between an attorney and solicitor and a gentleman who is or was his articulated clerk. The defendant choosing, or having had chosen for him the legal profession, was articulated to Mr. Puddicombe, with whom he appears to have remained a year or two. From some unexplained cause Mr. Puddicombe and he parted, and I collect that the defendant went to India, whence he returned in 1848, or early in 1849. On his return from India he made or renewed an acquaintance with the plaintiff; and appearing then to have thought of resuming his profession, he placed himself in the plaintiff's office as clerk, and as I suppose gratuitously. After he had remained there some time, the articles in question were executed, by which the defendant became the articulated clerk of the plaintiff for five years from September, 1849 (when the defendant was in his 23rd year), in consideration of a premium of £150. By the articles this premium of £150. is mentioned as having been received, and the defendant is expressed to be released from it in the usual form. It was not, however, paid. But the articles were accompanied by a memorandum, not under seal, promising to pay the amount, and also by a document, the subject of the present suit, —viz., an agreement to charge by way of equitable mortgage certain property of the defendant with the £150. This was in September, 1849. The service appears to have continued for some months, not however with satisfaction to the plaintiff, for it is to be inferred from the evidence that the defendant's habits were irregular and idle. A letter of remonstrance, which is in evidence, strengthens this view. At last, in 1850, the defendant quitted the office, and his employment was never resumed. His departure was final, and the separation seems to have been equally agreeable to the plaintiff and himself. But the £150 remained unpaid. The service, such as it was, I repeat, was to be taken as having commenced in September, 1849, and continued to some time in 1850. The plaintiff having still thought it right, though the service was discontinued, to

demand the premium, which it was inconvenient or not agreeable to the defendant to pay, brought an action for it, and the action was met by three pleas :—1st, 'never indebted,' true or untrue; 2ndly, 'payment,' utterly untrue; 3rdly, 'a release,' namely, the deed which had, against the truth of the case, acknowledged the money to have been paid. The plaintiff was advised, and perhaps correctly advised, that it was vain to pursue the action under such circumstances, and accordingly suffered a *non. pros.* to be entered, and thereupon he filed the present claim, for the purpose of making available the equitable mortgage which I have mentioned. It was met by a defence upon affidavits, charging the plaintiff with gross neglect of his duty to the defendant, habitual drunkenness, immorality, profligacy, and incapacity, in terms so gross and to such an extent, that it is impossible in my judgment not to impute to this testimony the most censurable exaggeration, to use the lightest term. This led to other affidavits on the part of the plaintiff, and much evidence of more or less relevancy is thus imported into this unhappy suit.

"Fortunately there is a fact which, in one view of the case, is sufficient, according to my judgment, to dispose of it; namely, that the attorney and solicitor did not make or cause to be made the requisite affidavit for enabling the articles to be enrolled, and accordingly they were not enrolled. Now, the act of the 6th & 7th of the Queen provides, "that whenever any person shall, after the passing of this act, be bound by contract in writing to serve as a clerk to any attorney or solicitor as aforesaid, the attorney or solicitor to whom such person shall be so bound as aforesaid shall, within six months after the date of every such contract, make and duly swear, or cause or procure to be made and duly sworn, an affidavit or affidavits of such attorney or solicitor having been duly admitted, and also of the actual execution of every such contract by him the said attorney or solicitor and by the person so to be bound to serve him as a clerk as aforesaid, and in every such affidavit shall be specified the names of every such attorney or solicitor and of every such person so bound and their places of abode respectively, together with the day on which such contract was actually executed; and every such affidavit shall be filed within six months next after the execution of the said contract with and by the officer appointed or to be appointed for that purpose, as hereinafter mentioned, who shall thereupon enrol and register the said contract, and shall make and sign a memorandum of the day of filing such affidavit upon such affidavit and also upon the said contract." The act also provides (s. 9),—"That in case such affidavit be not filed within such six months,

the same may be filed by the said officer after the expiration thereof, but the service of such clerk shall be reckoned to commence and be computed from the day of filing such affidavit, unless one of the said courts of law or equity shall otherwise order.'

"In the present case, the six months had passed before the defendant had finally quitted the office and employment of the plaintiff, and accordingly, therefore, the service of the defendant could not count, except from a time which never arrived, namely, the period when the affidavit should have been filed for the purpose of procuring enrolment; unless a court, in the exercise of its discretion, should order that the affidavit might be filed subsequently, as allowed by the statute. It is impossible for us to say whether, in a state of things which never existed, the court would have so ordered; and accordingly the defendant never has been in a position in which his services could count, and I must hold that position to have been occasioned by a neglect on the part of the plaintiff; a duty thrown upon him by act of Parliament. It would have been incumbent on the plaintiff to perform this duty, if the defendant had been a minor, and it not the less became the attorney's duty because the clerk happened not to be a minor, and happened to have received some previous instruction, and to have had some previous experience. Now, whether if this case had been made in a court of law, the circumstances would have been a defence, I am not here to consider. But I apprehend that a cross action might have been brought by the clerk against the attorney for a neglect of duty to the disadvantage of the clerk. We are not bound to send the parties to a court of law, either by reforming the deed or upon admissions; for whatever doubt may at any former time have existed on this point is now removed by the 62nd section of the act for the improvement of the practice in Chancery.

"My impression, formed upon the undisputed facts is, that if this matter had arisen before a court of law in a shape calculated to raise the point, either in one action, if in one action it could be tried, or in an action and a cross action, if in one action it could not be tried—the result would have been that the attorney could not have recovered, or if he had he would have lost in the one what he would have gained in the other.

"The consequence, without entering into more prolonged investigation of the matter, is that the title of the plaintiff has failed."

EXAMINATION QUESTIONS.

TRINITY TERM, 1855.

PRELIMINARY.

1. Where, and with whom, did you serve your clerkship? 2. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship? 3. Mention some of the principal law books which you have read and studied. 4. Have you attended any, and what law lectures?

COMMON LAW.

1. What do you understand by the words "Common law?" 2. What alterations in the law of evidence have been made by the recent statutes? 3. What is the proper course to pursue to prevent the operation of the Statute of Limitations where a defendant has not been served with the writ? 4. Can a person obtain an injunction at law, and in what cases? 5. What course may be adopted to obtain a discovery from the opposite party personally in an action at law? 6. What is now the law with respect to the proving of instruments by the attesting witnesses? 7. What circumstances preclude a person from a successful application to set aside process or proceedings for irregularity? 8. Where a year has elapsed since the last proceedings in an action what notice is required to be given by the party seeking to proceed? 9. When the defendant pleads the general issue, intending to give special matter in evidence by virtue of an act of Parliament, what particulars should accompany the plea? 10. Has a judgment creditor any, and what, means of getting at debts which may be owing to the judgment debtor, and what is the course which he should adopt? 11. "I guarantee the payment of any goods which C. D. may deliver to A. B."—is this a good guarantee? 12. Upon what principle does the liability of a husband upon his wife's contract rest, and in what cases may a wife be regarded as the general agent of the husband? 13. Within what time must error be brought to reverse a judgment, and what exceptions are there to the limit? 14. What is a feigned issue? in what case is it resorted to, and by what authority is it framed? 15. Explain the difference between a verdict and a judgment.

CONVEYANCING.

1. What is an estate tail? By what words is it created, and what words constitute an entail general, and what an entail special? 2. What power of disposition has a tenant in tail over entailed property, both as regards his own estate tail, and all remainders over, and distinguish the case where there is a protector of the settlement from the case where there is

no protector. 3. By what method of conveyance is the power of disposition of a tenant in tail at the present day to be exercised? 4. State the searches which should be usually made on a purchase of freehold property. 5. Give a general sketch of the devolution of personal property according to the Statutes of Distribution. What was the position, legal and equitable, of an executor in respect of residue undisposed of by the will previously to the statute 11 Geo. 4, and 1 Wm. 4, c. 40; and what alteration did that statute make? 6. Where an intestate dies seised of real estate, leaving children, state the law of descent according to the common law, and mention certain exceptional lines of descent allowed by custom. 7. In a sale of land by trustees, what covenants can be required of them in the conveyance? 8. What is required by the Statute of Frauds to constitute a valid agreement as to lands? 9. How are the requisitions of the Statute of Frauds complied with at an auction as usually conducted? 10. What are the proper modes of mortgaging freehold, leasehold, and copyhold estates? State them severally. 11. By what methods alone can a will be revoked under the late Statute of Wills, 1 Vic. c. 26? 12. State generally the more important provisions of the late Statute of Wills, and point out the alterations effected thereby. 13. A. dies seised of real estate and intestate, leaving a father, a sister of the whole blood, and a brother of the half blood. Upon whom would the estate have descended previously to the operation of the late Inheritance Act, 3 & 4 Wm. 4, c. 106; and upon whom would it descend subsequently thereto? 14. To whom, in the absence of any special custom to the contrary, do the timber and minerals upon and under the waste lands of copyhold manors belong, and to whom the timber and minerals under copyhold lands? 15. An estate is limited to A. for life, and after his death to the heirs of his body—what estate does A. take?

EQUITY.

1. What are the several modes of commencing a proceeding in equity according to the present practice? Mention the first step in each proceeding. 2. In a case where a defendant neglects to answer, or puts in an insufficient answer to a bill, how would you proceed to compel an answer, and a complete answer, according to the present practice? 3. In what case would you demur to a bill instead of answering? And state how a demurrer differs from an answer in regard to the facts alleged in the bill. 4. How does the court administer assets as between judgment, bond, and simple contract creditors, and as between judgment creditors themselves, though of different priorities of date? 5. How is an Irish judgment regarded in the administration of assets in

England. 6. State the course of distribution of an intestate's personal estate in the following cases: where there is a wife and children—where there is a wife and collaterals only—where there is no wife or children, but a father, and brothers and sisters—where there is no father, but a mother, brothers, and sisters, and children of a deceased brother or sister. 7. Explain the doctrine of election as applied in a court of equity. Take a case where it arises under a will. 8. State some cases in which relief can only be obtained in a court of equity. 9. In the case of the breach of a contract for the sale and purchase of an estate, what is the remedy in equity as distinguished from the remedy at law? 10. In the case of a contract for the sale and purchase of a freehold estate, where the vendor dies before conveyance, who is entitled to the purchase-money, the heir or devisee, or the personal representative, and if the purchaser dies before conveyance to whom does the estate go, and by whom is the purchase-money to be paid? 11. If a husband assign his wife's reversionary equitable interest in personalty, and die before the reversion falls into possession, will the right of the wife be affected thereby, if she survive? 12. In the case of a trust of money for the separate use of a woman free from the control of any husband, with a provision against alienation, would the restriction prevail if she is single when the interest vests in her, and would it exist during a subsequent coverture, and would it continue in force if she afterwards became a widow? 13. State a case in which money is treated in equity as real estate, and a case in which land is regarded as personal estate. 14. Where no time of payment or rate of interest is expressed in a will, at what period is a legacy payable, and from what time is the legatee entitled to interest, and what would be the rate of interest? 15. In what case will a legacy not lapse by the death of a legatee in the lifetime of the testator?

BANKRUPTCY.

1. State generally the object of the bankruptcy laws—1st, as regards creditors; 2nd, as respects the bankrupt himself. 2. What are the principal statutes of recent date respecting bankrupts? 3. Point out the principal new matters which were introduced into the bankruptcy law and proceedings by the act of 1849. 4. What are the three conditions required to constitute a bankrupt? 5. Is there any, and what, jurisdiction in bankruptcy over a joint-stock company neglecting to pay its debts? 6. What is the nature of the dealing required to constitute a trading within the meaning of the bankrupt laws? 7. Enumerate the different acts of bankruptcy. 8. What are the requisites to support a petition by a

creditor, for an adjudication in bankruptcy? 9. As to the petitioning creditor's debt, what must be its character? 10. Is it essential to the validity of a petition for adjudication, that the petitioning creditor's debt should be due and payable at the time of the act of bankruptcy? 11. Specify generally the kinds of debts which may be proved under a bankruptcy. 12. Is any, and what, priority, allowed to judgment creditors? 13. In what cases will a joint creditor be entitled to dividends out of the *separate* estate? And if there be no joint estate, and an insufficient separate estate, is any joint creditor permitted to participate in the latter? 14. Is there any, and what, difference in the course of proceedings to be taken by a creditor having a *legal* mortgage, and by one having a deposit of deeds constituting an *equitable* mortgage? 15. Can a landlord distrain for rent when the messenger is in actual possession of the bankrupt's goods on the premises?

CRIMINAL LAW AND PROCEEDINGS BEFORE MAGISTRATES.

1. What is the nature of the wrong for which an indictment lies, and in whose name is it brought? Why is it illegal to compound or compromise an indictable offence? And state what exceptions there are to this rule. 2. In the following instance, state which of the parties are principals and which accessories, either before or after the fact. Where A. persuades B. to steal goods, which he does, while C. stands by and watches to prevent detection; D. afterwards conceals A. in his house, knowing of the theft. How many accessories can now be tried, and show how it differs from the old practice? 3. State shortly the question which is proper to be put to the jury where insanity is set up as a defence upon a trial for a criminal offence. 4. What is the duty of a grand jury in regard to finding or ignoring bills? In what respect does it resemble a coroner's jury? What number of jurors must concur in the finding? 5. What are the different kinds of challenges of jurors, and what is the number of peremptory challenges allowed to the defendant in cases of felony? 6. Is it in general allowable to charge more than one distinct felony in the same indictment, and state any exceptions which have been introduced by statute? In ordinary cases what is the course pursued where a prosecution includes two separate felonies in the same indictment? 7. What variances between the statement in the indictment and the facts proved is it now allowable for the court to amend, and what terms may it impose upon making the amendment? 8. If a person is indicted for actually committing a felony or misdemeanor, and he be proved to have only attempted to commit the offence charged, or if he be indicted for a misdemeanor, and the facts

proved amount to a felony, what course may now be adopted in either case; and wherein did the law differ formerly. 9. Define larceny. What matters were the subject of larceny at common law? How far is it necessary that there should be a positive gain to the person committing the theft? Where a person carries away and destroys a post-letter for the purpose of suppressing inquiries which it was supposed to contain, is that a larceny? If a person find a chattel, under what circumstances will he, or will he not, be guilty of larceny? 10. What is the nature of the pretence necessary to be proved to convict a person of obtaining money by false pretences? In what respect does this offence differ from larceny? 11. What is the rule as to the liability of infants to be convicted of felony? Are they considered incapable of committing felony up to any, and what age, and at what age are they liable as adults? 12. In what cases will the alteration of a genuine instrument amount to forgery? In indictments for forgery, is it necessary to set out in its terms the document alleged to be forged? Is it necessary to allege or prove an intent to defraud any particular person? 13. Upon whom is the liability cast by the common law of repairing highways and public bridges, and in what manner may that liability be shifted upon any other bodies or private individuals? If part of a highway which a parish is bound to repair be destroyed by natural causes (as washed away by the sea), can the parish be compelled to restore it? 14. What restrictions does the law of England impose upon the admissibility of confessions in criminal cases? Can the evidence of a wife ever be received in criminal cases for or against her husband? And if so, state under what circumstances. In what events may the deposition of a witness taken before the committing magistrate be read in evidence at the trial? 15. What is the effect of five years' residence in a parish upon the removeability of a pauper chargeable thereto? Does it affect the settlement also? Under what circumstances will, or will not, absence from the parish during the five years amount to a break of residence, and so render the pauper removeable?

EXAMINATION ANSWERS TRINITY TERM, 1855.

COMMON LAW (*ante*, p. 4).

I. *Common law*.—The common law consists, according to Blackstone, in the general immemorial customs, from time to time declared in the decisions of the courts of justice, which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative

writings of the venerable sages of the law. The common law is also called *lex non scripta*, or the unwritten law, because their original institution and authority are not set down in writing as acts of Parliament are, and our forefathers used to commit them to memory, and transmit them by words of mouth (see also Key, div. "Common Law," pp. 1, 2; 1 Steph. Com. Introd. s. 3; Hale's Hist. Com. Law, p. 3, *et seq.*).

II. *Alterations in the law of evidence.*—The 14 & 15 Vic. c. 99, enables the parties and the persons in whose behalf any action, suit, or other proceeding may be brought or defended, to give evidence on behalf of either or any parties to the action, except that no party is to be compelled to criminate himself, nor is any husband and wife compellable or competent to give evidence against each other. By 16 & 17 Vic. c. 83, husbands and wives may be witnesses for or against each other, but they are not to be compelled to disclose any communication during marriage, and the provision does not extend to proceedings of a criminal nature, or for adultery (Davies' County Courts, p. 68, 2nd edit.). By the Common Law Procedure Act, 1854, a party may discredit his own witness; the witness may be questioned as to his guilt or innocence of a felony or misdemeanor; comparison of hand-writing is allowed; an attesting witness to a document not requiring attestation need not be called (see *infra*, No. VI.); unstamped documents may be received on depositing the amount of the stamp penalty and an additional penalty of £1 (see 1 Law Chron. pp. 158, 159).

III. *Saving Statute of Limitations.*—Since the Common Law Procedure Act the proper course to pursue is merely to renew the writ of summons at any time within six months of its date, and this renewal may be repeated as often as may be necessary, and the writ so renewed will be in force for all purposes as from the date of the issuing of the first writ (1 Law Chron. pp. 313, 314).

IV. *Injunctions at law.*—An injunction is a power given to prevent the repetition or continuance of a cause of action in respect of which an action has already been brought. This remedy was conferred by the C. L. P. A. (secs. 79—82) upon the courts of common law, whereas, hitherto, the courts of equity alone possessed preventive remedies. The injunction is claimed either by an endorsement on the writ of summons, or it may be applied for *ex parte* at any stage of the cause, either before or after judgment. It is obtainable in all cases of breach of contract or other injury (1 Law Chron. p. 162). An injunction may also be obtained in patent cases (1 Law Chron. p. 126).

V. *Discovery at law.*—Secs. 51—57 of the C. L. P. A. 1854, confer on the courts of common law a

new power, which enables a party, in an action at law, previous to the trial, to obtain from his adversary personally a discovery whether of facts or documents, for which formerly resort was to be had to a court of equity. Now, therefore, either party may deliver to the opposite party, if he would be liable to be examined as a witness, or his attorney, written interrogatories on any matter in which discovery is sought, and to require such party within ten days to answer the questions in writing by affidavit; and the omission to answer sufficiently without cause is punishable as a contempt of court. Leave to deliver these interrogatories must be obtained from the court or judge, and by the plaintiff when he delivers the declaration, or by the defendant when he delivers the plea, but it may be granted at any other time. There must be an affidavit of the party proposing to interrogate, and his attorney or agent, stating that the deponents believe that the party proposing to interrogate will derive material benefit from the discovery which he seeks, that there is a good cause of action or defence upon the merits; and if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay (1 Law Chron. 160, 380).

VI. *Evidence—Attesting witness.*—The C. L. P. A. 1854, s. 26, provides that no instrument need be proved by the attesting witness, unless attestation is requisite to its validity, as in case of the execution of a power; so that any instrument, whether attested or not, is proveable by admission or otherwise, which provision saves the trouble and expense of procuring evidence of facts which the opposite party may be prepared to admit (1 Law Chron. 158).

VII. *Irregularity—Waiver of.*—The 135th section of R. G. Hilary Term, 1853, answers this question. It provides that no application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

VIII. *Discontinuance of proceedings during a year—Notice.*—By sec. 176 of R. G. Hilary Term, 1853, in all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed, shall give a calendar month's notice to the other party of his intention to proceed. The summons of a judge, if no order be made thereupon, shall not be deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

IX. *General issue by statute—Particulars of.*—By the pleading rules of 1853, pl. 21, in every case in which a defendant pleads the general issue by statute, intending to give a special matter in evidence, he

must insert in the margin of the plea the words "by statute," together with the particulars of the statute relied on.

X. *Obtaining payment from debtor to judgment debtor.*—Any judgment creditor may, since the C. L. P. A., 1854, in virtue of ss. 60—67, obtain from a court or a judge a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him, and either before or after such oral examination a judge may, upon the *ex parte* application of such judgment creditor, and upon affidavit that judgment has been recovered, and to what amount it is still unsatisfied, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order all debts so owing shall be attached to answer the judgment debt, and the garnishee, as such third party is called, may be ordered to appear before the judge to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor. A notice to the garnishee of an order for attachment of the debts due or accruing to the judgment debtor binds such debts in his hands (1 Law Chron. pp. 160, 161, 419, 420).

XI. *Guarantee.*—The guarantee stated in the question is a valid one, for there is a consideration which is future and not past (see Key, div. "Common Law," pp. 45, 46, 3rd edit.; Bainbridge v. Wade, 15 Jur. 572; Goldshede v. Swan, 1 Exch. Rep. 154). Indeed, the only doubt would be whether it was not an original liability according to the distinction noticed Key, div. "Common Law," pp. 44—46, 3rd edit.; 5 Law Stud. Mag. N. S. 258—268.

XII. *Liability of husband for wife's debts.*—The wife is generally incapable of contracting to bind herself or her husband (unless by his authority), and such acts done by her are merely void (1 Bl. Com. 444). But there are several exceptions to this disability. First, upon the principle that a husband is bound to maintain her, her contracts made for the sole purpose of supplying herself with necessaries suitable to her station in life will in general be binding on him, though not upon herself; for if they be living together his consent to such contract will ordinarily be presumed; and not only while they cohabit, but even after a separation by consent, he is in general liable on her contracts for supplies of this description, if no provision be otherwise made for her (see further Key, div. "Common Law," pp. 55—57, 3rd edit.; Edwards v. Towells, 6 Scott N. R. 641; 12 Law Journ. C. P. 239; 2 Steph. Com. 250 252, 2nd edit.; 6 Law Stud. Mag. N. S. 153, 154).

XIII. *Error—Time for bringing.*—Error must be sued out within six years after judgment, which a party intends to reverse; and in the case of a person

being—an infant, feme covert, *non compos mentis*, in prison, or beyond the seas, six years after the removal of the disability (15 & 16 Vic. c. 76, s. 146).

XIV. *Feigned issues.*—A feigned issue is a mode adopted without a regular set of pleadings for determining some question or questions of facts by a jury (or by the court under the Common Law Procedure Act, 1854, s. 1; 1 Law Chron. 157), either directed by a court of equity or by a judge at law under the Interpleader Act or the Tithe Commutation Act, or by consent of the parties under the Common Law Procedure Act, 1852, s. 42. As to feigned issues strictly so called by sec. 19 of the 8 & 9 Vic. c. 106; after reciting that many important questions are now tried in the form of feigned issues, by stating that a wager was laid between two parties interested in respectively maintaining the affirmative and the negative of certain propositions, but such questions may be as satisfactorily tried without such form, it is enacted, "That in every case where any court of law or equity may desire to have any question of fact decided by a jury, it shall be lawful for such court to direct a writ of summons to be sued out by such person or persons as such court shall think ought to be plaintiff or plaintiffs against such person or persons as such court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this act annexed, with such alterations or additions as such court may think proper, and thereupon all the proceedings shall go on and be brought to a close in the same manner as is now practised in proceedings under a feigned issue." The above form is not compulsory, though it ought to be acted on (see Luard v. Butcher, 15 Law Journ N. S., C. P. 187).

XV. *Verdict and judgment.*—A verdict is the unanimous finding of the jury on the point or issue of facts submitted to them (Steph. Plead. 100). A judgment is the sentence of the law pronounced by the court upon the finding of the jury on the facts, or its own determination in matters of law.

CONVEYANCING (*ante*, p. 4).

I. *Estate Tail.*—An estate tail is a fee restricted to the heirs of the body of the donee. In a deed the words "heirs of the body," or some other words of procreation, are necessary to create an entail; in a will such strictness is not required. An entail general is where the estate is limited to the heirs of the body of the donee; an entail special where it is limited to the heirs of the bodies of two particular persons (1 Steph. Com. 230, 1st edit.; 2 Black. Com. 113; Litt. Ten. ss. 12, 17, 20, 23, 24; Key, div. "Conveyancing," pp. 28—32, 3rd edit.).

II. *Dispositions by tenants in tail.*—A tenant in tail can, by himself, dispose (by deed) of the estate in

fee simple as against his issue, and also as against the remainder-men, except where there is such a prior estate as constitutes the owner thereof protector of the settlement, in which case the protector must consent to the disposition in order to bar the remainders (3 & 4 Will. 4, c. 74, ss. 22—34; Hay. Convey. 137, 166, 170, 172, 4th edit.; Key, div. "Conveyancing," pp. 35—37, 3rd edit.; 1 Law Chron. 437).

III. *Tenant in tail's disposition*.—The disposition by the tenant in tail in order to pass a fee simple must be by deed—i. e., any assurance by which a tenant in fee simple can alien his estate (Hayes, 614, n. 147; Key, div. "Conveyancing," p. 37, 3rd edit.).

IV. *Searches for incumbrances*.—The usual searches are for judgments, crown debts, lis pendens, annuities (see new act, 1 Law Chron. 429), and, if any reason to suppose the same may have happened, bankruptcy and insolvency. In register counties the registry is searched (see more fully 1 Law Chron. 330).

V. *Statutes of distribution—Executor's right to residue*.—By the Statute of Distributions (the 22 & 23 Car. 2, c. 10, s. 5), if there be a widow and children, the widow takes one-third and the children two-thirds of the deceased's personal estate; if no widow, the children take all; if no children, or issue of them, the widow has a moiety, and the other moiety (or, if not widow, the whole) goes to the next of kin of the intestate who are in equal degree, and those who legally represent them, but such representation (i. e., in the collateral line) stops at the children of intestate's brothers and sisters (Pett's Case, 1 P. Will. 25; Key, div. "Conveyancing," pp. 146, 147, 3rd edit.; Burton's Comp. pl. 1401—1411). Advancements to children are to be brought into account (Edwards v. Freeman, 2 P. Will. 235; Burt. Comp. pl. 1404 n. to 1407). Where a testator, without disposing of his whole personal estate, appoints an executor, the person so appointed was absolutely entitled at law to the undisposed of residue, but equity seized upon any slight expressions, and constituted him a trustee for the next of kin (Mapp v. Ellecock, 13 Jur. 290; Burt. Comp. pl. 1423). Now by 1 Will. 4, c. 40, the executors are, in equity, trustees for the next of kin, unless the will shows a contrary intention (Wood v. Cox, 1 Keen, 317; Briggs v. Penny, 13 Jur. 905).

VI. *Descent*.—On the death of an owner of real estate his eldest son will take such estate; if daughters only, they will all take together. If the lands be gavelkind, all the sons take; if borough English, the youngest son alone takes (Key, div. "Conveyancing," pp. 22, 23, 71—75; Litt. Ten. ss. 2—8, 165, 167, 211, 586; 1 Steph. Com. 375, et seq.)

VII. *Trustees' covenants*.—Trustees covenant merely that they have not incumbered (1 Law Chron. 438).

VIII. and IX. *Statute of Frauds—Contract for sale of lands*.—On a private contract, and also on an auction sale, of lands, there must be an agreement in writing, which, by the Statute of Frauds (29 Chas. 2, c. 3), must be signed by the party to be charged, or some other person thereunto (that is to the signing thereof, 1 Ves. and Beam. 207) by him authorised. But it will be sufficient to satisfy the requisites of the statute if the auctioneer (who is considered the agent of both purchaser and vendor) write down the name of the party whose bidding is accepted opposite to the lot or lots purchased by him (White v. Proctor, 4 Taunt. 209; Sugden's Vend. and Purch. 98, 8th edit.; Bracebridge v. Heald, 1 Barn. and Ald. 722; 2 Law Stud. Mag. N. S. p. 218, 220).

X. *Mortgages*.—Freeholds are mortgaged by either a grant thereof in fee, or by a demise for a term; leaseholds by a sub-demise (1 Law Chron. 266); copyholds by a conditional surrender (Key, div. "Conveyancing," pp. 75—79, 3rd edit.; 5 Jarman's Conv. by Sweet, 234, 430, 508; Coote's Mortg. 116, 3rd edit.).

XI. *Will revoked* [1 Law Chron. 438].—By the 7 Will. 4 and 1 Vic. c. 26, s. 18, a will made by a man or woman is revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions). By sec. 20, a will may be revoked by another will or codicil executed in due form, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XII. *Provisions of Statute of Wills*.—The most important provisions of the Statute of Wills (1 Vic. c. 26), making alterations in the old law were, enabling a devise by an unadmitted devisee, &c., of copyholds, of a mere right of entry and of future acquired real estate; no will by an infant is valid; it provides, as stated above, for revocations; a will in exercise of a power is to be executed like other wills; a general devise includes property which the testator had power to devise; words of limitation are not required to pass a fee; the death of a devisee in tail, leaving issue surviving the testator, is no lapse; and the death of a child (leaving

issue) to whom a devise or bequest is made not determinable with his life, is not a lapse; two witnesses are required to a will, which is to be signed at the foot or end, as explained and amended by a subsequent act, the 15 & 16 Vic. c. 24; gifts to attesting witnesses are void, and they are to be good witnesses (1 Law Chron. 266, 414); a residuary devise is to comprise lapsed gifts.

XIII. Descent—Father.—As the intestate left a father he will take in exclusion of the sister of the whole blood and of the brother of the half-blood. This is by the 3. & 4 Will. 4, c. 106, previously to which the sister would have taken, as the father could not, nor could the half-blood inherit to the intestate (Litt. Tenn. ss. 3, 6, 7, and notes; Key, div. "Conveyancing," pp. 72—74, 3rd edit.; Hay. Conv. 319, 5th edit.; 282, 4th edit.; 2 Black. Com. 13, 212, 224, 227).

XIV. Timber and Minerals—Copyholds.—The timber and minerals in or upon the wastes of a copyhold manor, or the lands of a copyholder, belong, in the absence of any special custom to the contrary, to the lord of the manor. But the lord cannot, without a special custom, enter on the copyholder's lands to take the timber or minerals to his own use, without the consent of the copyholder (Lord Raym. 551; 2 Law Stud. Mag. N. S. pp. 178, 179; 3 Barton's Elem. Convey. 59, 66; Comyn's Dig. tit. "Copyhold" (M. 3); Doe v. Wilson 11 East, 56; 2 Steph. Com. 46, 1st edit.; Grey v. Duke of Northumberland, 13 Vesey, 236; Whitechurch v. Holworthy, 19 Ves. 213; S. C. 4 Mau. and Selw. 340; Lewis v. Brentwate, 2 Barn. and Adol. 438; Dearden v. Evans, 3 Jur. 703; S. C. 5 Mees. and Wels. 11; 4 Jur. 49). The copyholder may, by special custom, cut down trees, and may do so, it seems, without custom, to make needful repairs. (Comyn's Dig. tit. "Copyhold" (K. 7, and M. 3); 3 Barton's Elem. Convey. 58, 59; 2 Steph. Com. 46, 1st edit.; vol. 1, p. 594, 2nd edit.; Gilb. Tenures, 237, 238.

XV. Limitation to A. for life, and after death to heirs of body.—Under a limitation to A. for life, and after his decease to the heirs of his body, A. takes an estate tail general (Fearn's Cont. Rem. 28; Doe v. Welford, 12 Adol. and Ell. 61; Burt. pl. 339; 5 Jur. 35).

CRIMINAL LAW AND PROCEEDINGS BEFORE MAGISTRATES (*ante*, p. 6).

I. Indictment—Compromise of an indictable offence.—An indictment lies not for the redress of the private wrongs or civil injuries which are an infringement or privation of the civil rights which belong to individuals considered merely as individuals, but for the redress of public wrongs or crimes and misdemeanors

which are a violation of the same rights considered in reference to their effect on the community at large. As to these offences against the laws of society, and which are called crimes or misdemeanors, according to the gravity of the act, the temporal magistrate is empowered to inflict coercive penalties for such transgressions, and this by the consent of individuals who, in forming societies, invested the sovereign power with a right of making laws and of enforcing obedience to them by penalties adequate to the evil produced by their non-observance. So that an indictment is always brought in the name of the Queen. It is justly considered illegal to compound or compromise an indictable offence, because, as we have seen before, society at large is interested in the repression of crimes and the offence of *compounding of felony* or taking a reward for forbearing to prosecute an offence of that description was formerly held to make a man accessory, but is now punished only with fine and imprisonment (Hawk. P. C. b. I., c. 89, s. 6).—As to compounding misdemeanor, such a proceeding seems to be also illegal with leave of one of the courts at Westminster (4 Bla. Com. 136, note by Christian). But it is not uncommon when a person is convicted of a misdemeanor more immediately affecting an individual, as a battery, imprisonment, or the like, for the court to permit the defendant to *speak with the prosecutor* before judgment, and, if the latter is satisfied, to inflict but a trivial punishment.

II. Principal—Accessories—Trial.—An accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. So that if the party be present when the felony is committed he is an aider and abettor, and not an accessory before the fact (1 Hale, 615; Reg. v. Gordon, 1 Leach, 515; 1 East P. C. 352). An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon (1 Hale, 618; 4 Bla. Com. 37). Where A. persuades B. to steal goods, which he does while C. stands by and watches to prevent detection, and D. afterwards conceals A. in his house, knowing of the theft, A. is an accessory before the fact; C. an aider and abettor; D. an accessory after the fact. Formerly an accessory could not, without his own consent, unless tried with the principal, be brought to trial until the guilt of the principal had been legally ascertained by conviction (1 Anne, s. 2, c. 9). But now accessories before the fact shall be deemed guilty of felony, and may be indicted as accessories before the fact with the principal or after the conviction (7 Geo. 4, c. 64, s. 11), and as this statute only applied where the accessory might at common law have been indicted, a more recent act,

11 & 12 Vic. c. 46, s. 1, extends its provisions to felonies by virtue of any statute; and by the second section of the last-mentioned statute all accessories are to be joined in the same indictment (see also 14 & 15 Vic. c. 100, ss. 14, 15, stated Key, div. "Criminal Law," pp. 78, 79, 2nd edit.).

III. *Indictment—Insanity—Question to the jury.*—After having told the jury in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; the usual course is to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong, the question being accompanied with such observations and explanations as the circumstance of each particular case required (Answer of the judges, with the exception of Maule, J., to the questions propounded to them by the lords on the discussion raised in their house by the case of Reg. v. M'Naughten, Arch. Crim. Pro. 12 Ed. p. 15).

IV. *Grand jury—Finding or ignoring bills—Coroner's jury.*—When the grand jury have heard the evidence, if they think it a groundless accusation, they indorse on the back of the bill "not a true bill," or (which is the better way) "not found," and then the bill being thrown out, the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury, and if they are satisfied of the truth of the accusation they then indorse upon it "a true bill." The indictment is then said to be found, and the party stands indicted. But to find a bill at least twelve of the jury must assent to the accusation, though some of the rest disagree. The inquisition held before the coroner by a jury to enquire how a party came by his death bears some resemblance with the proceedings of the grand jury, as the inquisition must be found with the concurrence of at least twelve of the jury; and provisions are made by 6 & 7 Vic. c. 83, to prevent it from being quashed on account of certain technical defects in the statute enumerated.

V. *Challenge of jurors—Felony.*—When the trial of a prisoner is called on the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party. Challenges may be here made either on the part of the crown or that of the prisoner, and either to the whole array or to the separate polls. Challenges to the array are exceptions to the entire panel, in consequence of some partiality imputed to the sheriff or other officer who arrayed it. Challenges to the polls are exceptions to particular jurors, and are of four kinds: 1st. *Propter honoris respectum*, as if a lord of parliament were to be empanelled. 2nd. *Propter*

defectum, as if one of the jurors be an infant, alien, idiot or lunatic, or have not a sufficient estate. 3. *Propter affectum*, for partiality, or to the favour grounded on some probable cause of suspicion, as acquaintance, or the like. 4th. *Propter delictum*, which takes place when the juror is tainted by some crime or misdemeanor which affects his credit. To these may be added the privilege allowed to aliens of challenging an alien juror for any cause other than the want of freehold or other qualification required by the act, 6 Geo. 4, c. 50, s. 47. These challenges are called challenges *for cause*, which may be without extent. But in cases of felony, *favorin em vita*, the prisoner is allowed to challenge a certain number of jurors without showing any cause at all. This peremptory challenge was settled by the common law to the number of thirty-five; but by 6 Geo. 4, c. 50, s. 29, the number is reduced to twenty; and by 7 & 8 Geo. 4, c. 28, s. 3, every peremptory challenge beyond the number allowed by law shall be entirely void, and the trial shall be proceeded with as if no such challenge had been made.

VI. *Indictment—Number of felonies in same.*—A defendant ought not in general to be charged with different felonies in different counts of an indictment, as, for instance, a larceny of the goods of A. in one count, and a distinct larceny of the goods of B. at a different time in another. Besides the exception in the case of high treason, where there may be different counts for different species of treason, such as compassing the Queen's death, levying war, adhering to the Queen's enemies (25 Ed. 3, s. 5; c. 2), and the conspiracies to imprison or do bodily harm to the Queen, (36 Geo. 3, c. 7, s. 1; the 16th sec. of 14 & 15 Vic. c. 100), it is lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them. If the objection to two separate felonies in the same indictment be made before the defendant has pleaded, or the jury are charged, the judge, in his discretion, may quash the indictment; or, if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed (Reg. v. Young, 3 T. R. 106), but it is no objection in arrest of judgment (O'Connell v. Reg. 11 Cl. and Fin. 155).

VII. *Indictment—Variations with facts proved—Amendment.*—By 9 Geo. 4, c. 15, the judges are empowered to amend the record upon which any trial may be pending in any indictment or information for any misdemeanor when any variance shall appear

between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof on the record; and by 11 & 12 Vic. c. 46, s. 4, this power is extended to an indictment for any offence whatever. But s. 1 of 14 & 15 Vic. c. 100, is still more general; it provides that whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be a variance between the statement in such indictment and the evidence offered in proof thereof, in the name of county, riding, &c., in the name or description of any owner or owners of any property which shall form the subject of any offence charged therein, or in the name or other description of any person or persons, thing or things, therein named or described, it shall be lawful for the court, if it shall consider such variance *not material* to the merits of the case, and that the defendant *cannot be prejudiced thereby in his defence on such merits*, to order the indictment to be amended, according to the proof, by some officer of the court or other person, on such terms as to postponing the trial, to be heard before the same or another jury, as the court shall think reasonable.

VIII. Indictment for felony—Facts proved to be a misdemeanor—Course.—By 14 & 15 Vic. c. 100, s. 9, if on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury that the defendant did not complete the offence, but was guilty only of an attempt to commit the same, he shall not by reason thereof (*as the law was before the enactment of the above statute*) be entitled to be acquitted, but the jury may find that he is not guilty of the felony or misdemeanor charged, but he is guilty of an attempt to commit the same, and he shall be punished in the same manner as if he had been indicted for the attempt; and by the 12th section, if upon the trial of any person for misdemeanor it shall appear that the facts given in evidence amount in law to a felony, he shall not by reason thereof be entitled to be acquitted of the misdemeanor (*according to the course adopted before the enactment of the above statute*), and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court shall think fit to discharge the jury from giving any verdict, and direct such person to be indicted for felony, in which case he shall be dealt with in all respects as if he had not been put on his trial for the misdemeanor.

IX. Larceny—Common law—Destruction of post letter to suppress inquiry—Finding of a chattel.—Larceny is the unlawful taking and carrying away of the personal goods of another with intent to deprive the right owner of the same or *animo furandi*. It is either *simple* or *compound*, that is accompanied with circumstances of aggravation. At

common law bonds, bills, and notes which concern mere *choses in action* were held not to be such goods whereof larceny might be committed, being of no intrinsic value and not importing any property in possession of the person from whom they are taken. Larceny, too, at common law, cannot be committed of things which are not the subject of property, as of a dead corpse, or of things in which no person has any determinate property, as treasure-trove or work, till seized by the king or him who has the franchise (1 Hale, 510) or of such animal in which there is no property either absolute or qualified, as of beasts *feræ naturæ*, and unreclaimed, such as deer, hares, and conies, fish in an open river, wild fowls; but if they are reclaimed or confined, and may serve for food, as deer inclosed in a park, fish in a trunk, pheasants in a mew, so that they may be taken at pleasure it is otherwise (1 Hawk. c. 33, s. 39); so all valuable domestic animals, as horses and all animals, *domitæ naturæ*, which serve for food, as swine, sheep, poultry, and the like, and the product of them, and the flesh of such as are *feræ naturæ* may be the subject of larceny. It is not necessary that there should be a positive gain to the person committing the theft, it is sufficient to make a thing the subject of larceny that it should be of *some value*, yet it need not be of the value of some coin known to the law, that is to say of a farthing at the least (Reg. v. Morris, 9 C. & P. 349). Where a person carries away and destroys a post letter, for the purpose of suppressing inquiries which it was supposed to contain, if it is *from a post letter bag, or from a post office or officer of the post, or a mail*, he shall be guilty of felony, and transported for life (ss. 27 & 28 of 1 Vic. c. 36). When a person finds a chattel, if he knows the owner at the time he finds the property, and does not restore it, this is larceny; but it is not larceny if he did not then know or had not the means of knowing who the owner was (Reg. v. Thurborn, 13 Jur. 499; Reg. v. Vincent, 11 Law Tim. 374).

X. False pretences—Larceny.—We have defined larceny the unlawful taking and carrying away of the personal goods of another with intent to deprive the right owner of the same; obtaining money by false pretences is an offence closely allied to larceny, though distinguishable from it, as being perpetrated through the medium of a mere *fraud*. It was likewise a misdemeanor at common law, and now, by stat. 7 & 8 Geo. 4, c. 29, s. 53, after reciting that a failure of justice frequently arises from the subtle distinction between larceny and fraud, it is provided that if any person shall by any false pretence obtain from any other person any chattel, &c., with intent to cheat or defraud any person of the same, he shall be guilty of a misdemeanor, and be transported for

seven years, or punished by fine or imprisonment, or both, as the court shall award. As to what is considered as a *false pretence* under this statute, it may be laid down, as the general rule of interpretation of the statute, that wherever a person fraudulently represents as an *existing fact* that which is not an *existing fact*, &c., and so gets money, &c., that is an offence within the statute (*Reg. v. Woolley*, 1 Den. C. C. 559; 3 C. and K. 98).

XI. Felony—Liability of infants—Adults.—One of the pleas or excuses which protect the committer of a felony from the punishment which is otherwise annexed thereto is infancy, which is a defect of the understanding or want of will. Infants under the age of discretion ought not to be punished by any criminal prosecution whatever (*Hawk. P. C. b. 1, c. 1, s. 2*). The age of discretion varies in various nations. With us, as the law now stands, and has stood since at least Edward 3, the capacity for guilt is not so much measured by the number of years as by the state of the understanding and judgment in the delinquent; under seven years of age, indeed, an infant cannot be guilty of felony (1 Hal. P. C. 27), for a felonious discretion is then almost an impossibility in nature, but at eight years old he may be guilty of felony (see in *Emlyn on*, 1 Hal. P. C. 25, the case of a boy of eight years old, who was tried, found guilty, and hanged for firing two barns); from eight years, then, up to fourteen an infant shall be *primâ facie* adjudged to be *doli incapax*, yet if it appear that he acted with discretion he may be convicted, and suffer the penalty. After he has attained fourteen he is presumed to be *doli capax*, and competent to commit a felony.

XII. Forgery—Intent to defraud any particular person.—Forgery is the fraudulent making or alteration of a writing or seal to the prejudice of another man's right, or of a stamp to the prejudice of the revenue (4 Steph. Com. 3rd ed. p. 209). It has been decided, that any material alteration, however slight, of a genuine instrument, is a forgery, as well as an entire fabrication—that the fraudulent application of a false signature to a true instrument or a real signature to a false one, are both forgeries; and that even if the name forged be merely a fictitious one it is as much forgery, if done for the purpose of fraud, as if it was the name of a real person (*Reg. v. Bontien, R. and R. C. C. R. 260*); but in all cases the instrument forged must so far resemble the true instrument as to be capable of deceiving persons who use ordinary observations (*Reg. v. Collicott, R. and R. C. C. R. 218; S. C. 229*). For an indictment for forgery it is now sufficient (14 & 15 Vic. c. 100, s. 5) to describe the instrument by any name or designation by which the same may be usually known, without setting forth any copy or

fac simile, or otherwise describing the same or the value thereof. The intent to defraud is described as an ingredient of the offence in all the statutes upon forgery, and must consequently be charged in the indictment. But it is now, under 14 & 15 Vic. c. 100, s. 8, sufficient to allege generally an intent to defraud, without alleging the intent to be to defraud any particular person.

XIII. Highways and bridges—Repairs.—By the common law the liability to repair highways is on the parish in which they lie, or through which they pass; but this liability, by prescription, is sometimes shifted upon particular townships, and sometimes, *ratione tenuræ*, upon individuals (14 Jur. 176). A surveyor of the highways is appointed to look after their repair, and a rate is levied on all property liable to the poor rate for keeping the highways in repair (2 Abr. Crim. Law, 10, 11, 38). The expenses of maintaining bridges is defrayed by the counties at large in which the bridges are situated (4 & 5 Vic. c. 49), and this is so as to bridges built by a private individual before 43 Geo. 3, c. 59, if the public use the same (14 Jur. 956), and where the parish is bound by prescription (as is sometimes the case, 4 Bar. and Ad. 62) to repair a bridge, there is a statutory provision which gives effect to any contract between the county and the parish for performing the repairs in future at the expense of the former, and relieving the latter from the charge. But if part of a highway which a parish is bound to repair be destroyed by natural causes (as washed away by the sea), the parish cannot be compelled to restore it.

XIV. Confession—Admissibility in criminal cases—Wife's evidence against husband.—A simple and plain confession of his guilt by the defendant is generally sufficient to support a conviction, but the courts are generally very backward in receiving and recording such confessions, out of tenderness to the life of the subject, and will generally advise the prisoner to retract it, and plead to the indictment, and this is on the supposition that the confession is freely and voluntarily made, otherwise, when obtained through any *threat* or *promise*, it is not even admissible in evidence. It is also a rule that if any part of a confession is appealed to the whole of it must be given in evidence, though the jury are at liberty to believe what they please (4 Car. and Pay. 221). A wife cannot in general be received as a witness for or against her husband, or *vice versâ*, but in criminal cases there are some exceptions. Thus, in case of treason a wife may give evidence against her husband, because the tie of allegiance is paramount to all others (1 Chit. Bl. 444, n.). So, upon a charge of forcible abduction and marriage, or other violence to her person, her deposition is receivable (1 Phil.

Ev. 71). By a recent statute (11 & 12 Vic. c. 42, s. 17) it is enacted that if, upon the trial of an accused, it shall be proved by the oath or affirmation of any credible witness "that any person whose deposition shall have been taken in the prescribed form by the committing magistrate is dead, or so ill as not to be able to travel," and if also it be proved that such deposition was taken in the presence of the accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, "then, if such deposition purport to be signed by the justice before whom the same was taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." But this deposition is receivable only where the indictment is for the same identical offence as that with which the defendant was charged before the justice (Reg. v. Lidbetter, 3 C. and K. 108).

XV. *Pauper—Five years' residence—Removeability—Settlement—Absence during five years.*—By a recent statute (9 & 10 Vic. c. 66, amended by 11 & 12 Vic. c. 111), introducing great alterations of the law in the subject of removal, it is provided that no person can be removed from a parish in which he has resided for five years next before the application for a warrant for his removal, nor for becoming chargeable for relief necessitated by sickness or accident, unless the justices granting the warrant shall state therein that they are satisfied that the sickness or accident will produce permanent disability, nor, in the case of a woman residing with her husband at the time of his death, till twelve calendar months after his death, if she shall so long continue a widow. As to the settlement, it is also provided that no person thus exempted from liability to removal shall, by reason of such exemption, acquire any settlement in any parish. It is to be observed, that time passed in prison or in military or naval service under her Majesty, or as an in-pensioner in Greenwich or Chelsea hospitals, or in confinement in lunatic asylums, or as a patient in a hospital, or during which relief (except *bonâ fide* charitable gifts) from any parish shall be received, is to be excluded from the computation of the five years; and the removal of a pauper lunatic to a lunatic asylum, under the provisions of any acts on that subject, is not to be deemed a removal within the meaning of this act. As to interruption of the residence see *Queen v. Caldecote* (20 L. J., M. C., 187) and 12 & 13 Vic. c. 103, s. 4, which provides that the removal of a lunatic to an asylum, or of a pauper to a workhouse, under the authority of the statutes on that behalf, shall not be deemed an interruption of the residence, but the time so spent shall be wholly excluded from the computation.

DEBATING SOCIETIES.

THE LAW STUDENTS' MUTUAL CORRESPONDING SOCIETY.

MOOT POINTS IN COURSE OF DISCUSSION.

No. 227.—A gentleman hired a servant, conditionally that the character he should receive from his late mistress should be satisfactory. He wrote for the character, and in answer received a letter from the mistress, which she requested might be confidential. The gentleman then told the servant that he would not suit, but refused to show the letter. Can the servant by any, and what, means compel the production of the letter in order to support an action against the lady for libel, which he believes it to contain?

No. 228.—A gentleman, on the marriage of his daughter, puts in settlement his freehold estate for her benefit, as follows:—By the terms of the settlement the estate is conveyed to trustees to the use of the settlor for life, remainder to the use of the trustees to secure a life annuity to his wife, remainder to other uses in favour of the daughter and issue of the marriage. Who is entitled to the custody of the title-deeds during the settlor's life? The trustee, of course, retains the settlement, but in *Williams on Real Property* reference is made to a rule that a tenant for life is entitled to the custody of the title-deeds.

No. 230.—A., a farmer, hires a lad for a year, who, during his service, runs a fork accidentally into his thigh, which places him *hors de combat*. A. fetched a doctor, who attended the lad, and in about a fortnight after the accident the parents of the lad removed him to their own house. The doctor still continued his visits to the lad until he was convalescent. Query—Who is to pay the doctor's bill from the time of the lad's parents taking him to their own house until his recovery?

No. 235.—A. appointed B. his executor. B. kept two accounts with a bank, one the "executor's account," the other his "private account." B. being largely in debt with the bank, and being requested to reduce the balance, requested the bank to transfer £2,000 from the executorship account to the credit of his private account, which the bank did. Is the bank liable to make good to the testator's estate the amount so withdrawn from it?

No. 237.—A., in 1842, mortgaged to B. for £10,000; in 1847, becoming accountable to the Crown, a memorandum was duly registered pursuant to 2 & 3 Vic. c. 11, s. 8. A. afterwards, in 1851, became indebted to the Crown in the amount of £8,000. Has the Crown priority over B., the mortgagee?

No. 238.—A mortgage for £50 bears a 1s. 3d.

stamp. Upon the deed there appears two considerations, one for £50, and the other a nominal consideration for 10s., both paid by mortgagee to mortgagor. Is the stamp sufficient?

No. 239.—A. goes from a distance to a fair at P., and there buys a number of cattle. He delivers them to B. (a man in the habit of taking similar commissions), to drive home for him; on his way B. meets with a person, to whom he sells the cattle, and then decamps with the money. Is B. guilty of larceny, and is there sufficient to show the existence of the *animus furandi* and the felonious intent so as to constitute the criminal offence of larceny?

No. 246.—A., being largely indebted, assigns property to B. in trust to pay certain creditors named in a schedule, who are neither parties nor privy to the assignment. B. subsequently gives them notice of the trust, but enters into no arrangement with them. Are the trusts revocable by A.?

No. 248.—Under a settlement made previous to the marriage of F. G. and E. G. a sum of £300, belonging to the wife, was assigned to trustees upon trust after the decease of the husband for the absolute benefit of the wife. In the lifetime of the husband the £300 was called in, and replaced out by the trustees on the security of a promissory note given to the wife and in her name. The husband is now dead, and the wife survives. He has left a will bequeathing all his property to T. O., whom he appoints his executor. Who is the person now entitled to the money, and in the event of the executor proceeding for the recovery what course must the wife adopt?

No. 251.—A. steals a number of foreign bank notes from B., and goes to a money-changer, where he gets them cashed. A. is arrested and brought to trial. The notes are of course produced at the trial for the purpose of identification, but a question arises to whom they should be returned, to B. or to the money-changer. Which has the best title to them?

No. 252.—A man holds land in special tail—i. e., to himself and the heirs of his body begotten by Jane his wife. Jane dies; he marries a second wife since the operation of the *Dower Act*, and dies himself, leaving issue begotten on Jane, his deceased wife, and so dies solely seized of an estate of inheritance in possession. Is his surviving second wife dowable under the second sec. of the *Dower Act*?

No. 254.—A., by his will, dated January, 1837, disposed of his personal estate in the parish of N. He subsequently married, and after his marriage executed another will bearing date 1st, June, 1840, whereby he disposed of the whole of his real and certain other portions of his personal estate. The second will was totally distinct from, and did not in

any manner refer to the first. Did the second will revoke the first? If not, did the marriage do so?

No. 260.—A. being seized in fee of freeholds, grants, lease thereof for a term of years to a farmer, and afterwards conveys the fee to B. Subsequently to B.'s purchase the farmer commits breaches of various covenants. The lease contains a proviso for re-entry by "A., his heirs and assigns," on breach of any of the covenants. B. desires to take advantage of the forfeiture, and obtain possession. Will ejectment lie in this case?

No. 261.—B. had a right of way to his house over the land of A. in a particular direction, which he constantly used. A. afterwards allowed B. to use another way, more direct than the first, which was fenced off and used by him for ten years, during which time he never used the original way. A. subsequently sold the land to C., who wished to block up the first way, but A. (B.?) objected, alleging that he, having used it within ten years, his right was not barred. Was the use of the second way by B. a sufficient evidence of his having abandoned the first to bar his right under 2 & 3 Wm. 4, c. 71, or what acts are necessary to constitute an abandonment?

No. 262.—A married woman has by her marriage settlement a power given her of appointing lands which were limited to a trustee for her separate use; the power was given to her to exercise "as if she were a *feme sole*" in the usual words. Query—1st. Must the husband join in a conveyance to a purchaser. 2nd. If so, must the deed be acknowledged by the wife?

No. 266.—In 1845 A. contracts with B. for the sale of lands to him (B.); and before the conveyance is executed dies intestate, and without issue, leaving D., his widow. Lands other than those contracted to be sold had been settled upon D. in satisfaction of her dower. D. administers to A.'s personalty. Can she compel the heir-at-law to sell the lands which A. had contracted to sell, and can she claim the purchase-money as administratrix? If so, can she claim interest from the date of the contract (if there is not sufficient left of the personalty after paying the debts to satisfy the interest from that date) from the heir-at-law, to be paid out of the other lands which he inherited from A.?

No. 268.—A. sells to B. some sheep. B. gives to A. a cheque drawn by C. upon his (C.'s) banker, payable to B. or bearer, in part payment of the sheep, and the balance was paid to A. in cash. A. kept the cheque about a fortnight, and then paid it away in the ordinary course of business. It was presented at the bank, and payment refused, and consequently returned to A., who, about two months after he received it of B., gave B. notice of its dishonour.

The cheque was not endorsed by B. when he paid it to A. C. was insolvent at the time he drew the cheque, and has been so ever since. Can A. recover of B. the amount of the dishonoured cheque?

No. 269.—A. being indebted to B. in £1,000, B. insured A.'s life (not in an indisputable office) for same, to indemnify himself against the probable loss of the amount. A. subsequently paid B. the money. The office, on A.'s death shortly afterwards, refused to pay B. the £1,000, alleging that his interest in A.'s life ceased on payment of the debt. Is the office liable to pay the amount?

No. 271.—J. B. makes a will, and after leaving his real and personal estate to trustees upon trust, for sale and conversion, directs them to divide the money arising therefrom amongst all his children, the share of any married woman to be for her own use, and her receipt alone to be a sufficient discharge. E. H., one of the daughters, is married, and on the estate being wound up her share was paid into her own hands, and a receipt from her alone taken therefore. The trustees have now discovered that they paid each residuary legatee £20 too much. All except E. H. have returned the money overpaid; she and her husband refuse to pay the money. Can the executors now maintain an action against the husband for the recovery of the sum which they, in error, paid to his wife?

No. 273.—A. B. goes to C. D., a solicitor, and requires an advance by way of mortgage of some £500 on certain property, the deeds of which he produces for inspection; the title seems good, and the advance is made. A. B., on being asked, stated that it was not encumbered or in settlement. In a little time, and from circumstances accidentally turning up, it proved that this very property had been settled by A. B. on his marriage on his wife for her separate use. A. B. of course suppressed all matter concerning this settlement. A. B. has now made an assignment for the benefit of his creditors. Query—What remedy has C. D. against A. B. for the recovery of this money? Can C. D. in this case be held liable for not having used due diligence and precaution in the matter in protecting the interests of his client?

CHARLES R. GILMAN, Hon. Sec.

Norwich. June 14th, 1855.

BIRMINGHAM LAW STUDENT'S SOCIETY.

At the meeting held on the 23rd May, 1855, the following moot point was discussed:—

"A. and his deceased wife's sister (both English) go to Berlin to intermarry. The marriage being duly solemnised there, they return. A. dies intestate. Will his only son, by such marriage, succeed to his real estate in England?"

Before the passing of the 5 & 6 Wm. 4, c. 54,

marriages between persons within certain degrees of relationship to each other (which degrees are enumerated in 25 Hen. 8, c. 22, and 28 Hen. 8, c. 7) were not absolutely void, but only liable to be dissolved during the lives of the contracting parties by sentence of the Ecclesiastical Court. The 5 & 6 Wm. 4, c. 54, after legalising all former marriages within the prohibited degrees of affinity, but not of consanguinity, provides that all future marriages (i. e., after 31st August, 1835), within the prohibited degrees of consanguinity or affinity, should be absolutely void. In *Reg. v. Chadwick* (11 Q. B. 173, and L. J. 1848, M. C. 133) it was decided that the sister of a deceased wife was within the prohibited degrees of affinity, and that the prisoner's marriage with such a person was so absolutely void, that he could not be convicted of bigamy for marrying again. This case, it was admitted, settles that the marriage supposed in the question would, if contracted in England, be absolutely void, and the issue bastards. On the other hand it is equally clear, that in Prussia, and many other continental states, such a marriage is good.

The first point made was: would the English law recognise the validity of the marriage abroad as a marriage?

In the affirmative it was argued, 1st, that marriage, like every other personal contract, was to be construed according to, and governed by, the law of the country where it was entered into, and that if valid there it was valid everywhere; and, 2nd, that this validity was not affected by the circumstance that the contracting parties went to a foreign country for the purpose only of doing there what they could not do in their own, or, to use the technical phrase, to commit a fraud on their domicile. To this it was replied in the negative that the rule contended for as to the *lex loci contractus* was not, even in the opinion of its warmest advocates, of universal application; if so, it would follow that a native of Turkey might in any other state claim to have all the wives which the laws of Turkey do, or did, permit him to have. It is true that Story, in his *Conflict of Laws*, states that the rule is subject to exceptions as to polygamy and incest, but as by the 5 & 6 Will. 4, c. 54, a marriage between a man and the sister of his deceased wife is *legally* as incestuous as a marriage with his own sister, he contends that a marriage which is to be an exception to the rule on account of incest, must be such a one as is accounted incestuous by the general public law of Europe. The rule and the exception have been so construed in the United States, in a case of *Greenwood v. Curtis*, 6 Mass. Rep. 378, and, so far as reason and morality are concerned, most properly construed. But it was contended in the negative,

that as no such judicial interpretation of the rule has ever been given by an English court, the only proper and safe course for an English lawyer to take was not to assume the universal applicability of a rule so obviously subject to such important exceptions, or to rely too much on the loose and general statement of that rule to be found in the books, but carefully to examine how far it has been applied in the decisions of our courts, and not to assume that it will be carried farther than such decisions, or obvious deductions from them will warrant. The English cases cited on both sides were, in the order of time, the following:—*Roach v. Garvan*, in 1748 (1 Ves. sen. 158) where a Frenchman, having married a ward in chancery of the age of eleven years, applied for her fortune, Lord Hardwicke, in deciding against the application, said, "It (the marriage) has been argued to be valid from being established by the sentence of a court in France having proper jurisdiction, and it is true that if so it is conclusive, whether in a foreign court or not, from the laws of nations in such cases, otherwise the rights of mankind would be very precarious and uncertain." This recognition of the *lex loci* was much relied on in the affirmative, but in the negative it was observed that Lord Hardwicke went on to say, that as the marriage only came in question collaterally in the foreign court, its sentence was not conclusive, and moreover, both the husband and wife were residing in France, and did not go there to get rid of the disability of age which the English law placed them under. In 1752, *Scrimshire v. Scrimshire* (reported 2 Hagg.) came before the Ecclesiastical Court, and the question was whether a marriage between two persons temporarily residing in France, which marriage was void by the *lex loci*, but only voidable in England, the original domicile of the parties, was void or voidable? (That was the converse of the moot point, for there the parties sought to avail themselves of, instead of to evade, the laws of their native land). The court pronounced it void, and observed that it was the law of nations "that the solemnities of different countries with respect to marriage should be observed, and that contracts of that kind are to be determined by the laws of the country where they are made." This decision was however reversed on the point by the Court of Appeal, and although the marriage was ultimately held void, it was on account of fraud, and the doctrine above laid down as to the *lex loci* disregarded.

In 1753 the Marriage Act, 26 Geo. 2, c. 33, was passed, prescribing certain formalities and consent of parents in order to render marriages valid, but declaring (s. 18) that its operation should not extend to Scotland, nor to any marriage beyond seas.

The first case on this statute occurred in 1756 *Butler v. Freeman* (Amb. 302), where a ward of Chancery had been taken away to Antwerp, and there married according to the law of England as it was previous to the Marriage Act. Lord Hardwicke said, "that there was a door open in the statute as to marriages beyond seas and in Scotland," and that the marriage would not be good in England unless solemnised according to the *lex loci*, thus differing with the decision of the Court of Appeal in *Scrimshire v. Scrimshire*, which, however, was not then reported: That the express exception in the Marriage Act of marriages in Scotland and abroad was considered to give such marriages validity also appears from two unreported cases in Chancery in 1759 and 1762 (see note to 2 Hagg. 377) and by the Ecclesiastical Court in *Crompton v. Bearcroft*, in 1769 (Bull. N. P. 113), where two persons under age, who ran away to Scotland to marry, were held to have contracted a valid marriage; and these cases, and some observations of Lord Brougham approving of them in *Warrender v. Warrender* (9 Bligh. H. of L. Rep.), were relied on as authorities for the second proposition in the affirmative, that the validity of the marriage was not affected by the fraud on the domicile. This was met by the argument that it did not follow because the courts, following the express language of the Marriage Act, had decided that the forms imposed by that act were not binding in Scotland, and abroad, that therefore persons could in the same manner evade the personal incapacity which it was contended was imposed by the 5 & 6 Wm. 4, c. 54, without any exception of marriages abroad.

[It may be perhaps useful to remind the reader that the Marriage Act of 1753 has long since been repealed, but it will be always necessary to be referred to, to understand the bearing of the cases last cited].

In the next case of *Harford v. Morris*, in 1776 (2 Hagg.), the question was, whether a marriage at Ypres, void by the *lex loci* for want of age of the wife, but good by the English law, and solemnised according to the English law as it was before the Marriage Act, was valid or not. It is there said (p. 431) "that the laws of the state to which the parties are subject must govern the marriage, unless you can show that the law of the other country is that by which it is to be determined;" and that it was not a transient residence which could give jurisdiction to the *lex loci*, and, therefore, the marriage was held good. In this case, too, the distinction was made between the forms of the Marriage Act, as only binding English subjects whilst in England, and the law as it existed before that act, which was held to be carried with, and to be bind-

ing on all English subjects until they acquired a foreign domicile. The latter proposition is all that was decided in *R. v. Brampton* (10 Ea. 282, A. D. 1808), and *Latover v. Teesdale* (2 Marsh, 248, A. D. 1816), which need not be further referred to except to remark that what is there said as to a marriage being good at common law without the intervention of a priest must be considered to be overruled by *Reg. v. Millis*, in the House of Lords (10 Cl. and Fin.).

Ilderton v. Ilderton, in 1793 (2 H. Bl. 145) is more relevant to the present case, inasmuch as it concerned real estate. It was a demand of dower of estates in England by the widow of a man married to her in Scotland. The court acknowledged the marriage as conferring a title to dower in England; but it is expressly stated by the reporter that it was because the parties were both domiciled in Scotland at the time of the marriage.

In *Dalrymple v. Dalrymple*, in 1811 (2 Hagg.) the validity of a secret marriage made in Scotland by mutual written promises only came in question, Sir W. Scott stated "that the only principle applicable to such a case by the law of England is that the validity of the marriage must be tried by reference to the laws of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." Again, in *Herbert v. Herbert*, in 1819 (2 Hagg.) the same judge says that it is "the established principle that every marriage is to be universally recognised which is valid according to the law of the country in which it is had, whatever that law might be." And again, in *Ruding v. Smith*, in 1821 (2 Hagg.) that "English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else."

The converse of this doctrine was laid down in *Kent v. Burgess*, in 1840 (11 Sim. 361) where a marriage at Antwerp between two British subjects, solemnised according to the English law, was held void for non-compliance with the *lex loci*. This is in direct opposition to *Scrimshire v. Scrimshire*, and *Harford v. Morris*, and indeed there is not a proposition to be drawn from the cases which is not in conflict with some decision, *e. g.*, on the important point of fraud on the domicile *Ilderton v. Ilderton* is directly opposed to *Crompton v. Bearcroft*, and the other cases following the latter decision.

It was further contended in the negative that none of these cases except *Roach v. Garvan*, had declared a marriage to be valid which would have been invalid by reason of the *personal incapacity* of the

contracting parties here, but all such cases concerned only the form and mode of making the contract. And although there is no case which expressly decides that a contract of marriage cannot be made abroad by persons who are incapacitated from doing so by the English law: yet there is a case which decides the converse of that proposition, *viz.*, that the contract of marriage cannot be dissolved in another country for causes which the English law does not regard as sufficient to dissolve it, and in deciding the converse, really involves the proposition contended for in the negative, *nam nihil tam conveniens est naturali equitate, quam unumquodque dissolvi eo ligamine quo ligatum est* (2 Inst. 359). The case referred to is *Lolley's case* (1 Russ. and R. 236) where the prisoner and his wife, having contracted marriage in England, where they were domiciled, and wishing to be divorced, went to Scotland, remained there so long as was necessary to obtain the divorce, and when obtained the prisoner returned to England and married again. For this second marriage he was indicted—convicted of bigamy; the conviction was affirmed by the twelve judges, who solemnly decided that the Scotch divorce *à vinculo*, not being for causes which would procure a divorce in England, was no defence, and the prisoner was transported. This decision has been repeatedly spoken of with disapprobation by Lord Brougham, and was no doubt a great hardship on the prisoner, but it has not yet been overruled, and has been followed in the Ecclesiastical Court in *Conway v. Beasley* (2 Hagg. Eccl. Rep. 689).

If, therefore, *Roach v. Garvan*, on one side, and *Lolley's case* on the other, were the only cases as to personal incapacity, there can be no doubt that the opinion of the twelve judges in the latter case, in 1812, is a much weightier authority than the casual observations of Lord Hardwicke to the contrary, in 1748. But on the point of personal incapacity, the *Sussex peerage case*, in 1844, is an important later authority. By the Royal Marriage Act, 12 Geo. 3, c. 11, all the descendants of George the Second were prohibited from marrying without the previous consent of George the Third, and all such marriages without consent are null and void. The late Duke of Sussex (being one of the persons included in the act) did marry without the required consent, not in England, but at Rome. The legality of the marriage was much debated during the life time of the late Duke, and a very learned opinion will be found in the *Law Mag.* vol. 7, p. 181, that the marriage at Rome was good *per legem loci*, and that the Marriage Act could not affect marriages out of England. After the Duke's death, his eldest son by the marriage presented a petition claiming the estates and honours of his father. The marriage as a fact was fully

proved. The only question was as to its validity; and in accordance with the opinion of the judges, it was declared invalid. The following passage from that opinion (11 Cl. and Fin. 146) will apply to the 5 & 6 Will. 4, c. 54, just as strongly as to the Royal Marriage Act:—"It was contended in the course of the argument that an act of the English legislature can have no binding force beyond or out of the realm of England, and if by this is meant only that it can have no obligatory force upon the subjects of another state, the position is no doubt correct in its full extent, but it is equally certain that an act of the legislature will bind the subjects of this realm both within the kingdom and without, if such was its intention. Indeed it was admitted by the learned counsel for the claimant, that if there had been found in the statute the words 'marriages within the realm or without,' or any words equivalent thereto under such an enactment, the capacity to contract a marriage at Rome would have been taken away, and the marriage there solemnized would have been null and void. But if the words found in the statute are comprehensive enough to include all marriages, as well those within the realm as without, as we think they are, and if at the same time the restraining the sense of those words to marriages within England must necessarily defeat the object and purpose of the act, as we think it would, then it seems to follow that the construction must be the same whether those words are in the act or not."

Lastly, against the validity of the marriage, a most decided opinion of Sir William Follett and Sir David Dundas, when attorney and solicitor general, was cited from the Law Magazine, Feb., 1849, p. 85.

The second point made in the negative was, that, although if the marriage were invalid, there could be no heir, yet, admitting the validity of the marriage as a marriage, it did not follow as of course that the issue thereof would succeed to real estate in England. For this proposition *Doe v. Birtwhistle v. Vardill*, which went from the King's Bench (5 B. and C.) to the House of Lords, and was there twice argued (6 and 9 Bligh's N. R.), and the opinion of the judges twice given was cited. The facts were that the plaintiff's father, being heir to real estate in England, removed to Scotland, and cohabited with the plaintiff's mother. Some years after the plaintiff's birth his father and mother intermarried, and, by the law of Scotland, such a marriage relates back so as to make all former children as legitimate as subsequent ones. After the death of his father, the plaintiff claimed the real estate, and the claim was resisted on the ground that an heir to lands in England must be born after the marriage of his parents. The two sets of judges being unanimous against the plaintiff's claim, judgment was given for

the defendant. The decision in that case went for the most part on the exclusion of *ante nati* by the statute of Merton (see 2 Steph. Com. 278) but much of the reasoning there is that an heir to lands here must be born *ex justis nuptiis*, of such a marriage as the English law considers lawful, and which would of course apply to the case supposed.

Taking into consideration the conflicting nature of the authorities, the society decided that the affirmative was not proved.

G. J. JOHNSON, Hon. Sec.

NOTICES OF NEW BOOKS.

DAVIS ON COUNTY COURTS.

A Manual of the Practice and Evidence in Actions and other Proceedings in the County Courts, with the Statutes and Rules. By JAMES DAVIS, Esq., of the Middle Temple, Barrister-at-Law. Second Edition. London: Butterworths.

THIS is a work which certainly has the great merit of being one on a subject of importance to practitioners in the county courts, and also of being well written. We are sorry our space will not permit us to notice it at the length it deserves, but the title, with a short statement of the contents, will enable the reader to form some judgment of the matters treated of by Mr. Davis. The first part is devoted to a sketch of the proceedings and practice of plaintiffs and defendants in actions in the county courts, which presents in a short compass the most readable account we have yet seen of county court practice. This part we especially recommend to the attention of articulated clerks, and even of those practitioners who, not being familiar with the practice of the county courts, may wish to obtain a general view thereof. Mr. Davis, in his preface, speaking of this portion of the work, says:—

"An addition has been made to the original work by the introduction of the Practice of the County Courts from the commencement to the termination of suits. In giving a general view of the practice of the courts the author has merely yielded to a wish expressed by many purchasers of the former edition, and has had no desire to enter on a field already occupied by other labourers. Bearing in mind that this part of the work, at least, must be chiefly used by practitioners in the courts, who will consult it with a view to ascertain the nature of the claim or defence they may represent, and the proper tribunal and mode of proceeding in order to establish it, and who are comparatively indifferent to the original constitution of the court or the nature of the appointment of its officers, the author has arranged the proceedings, as far as possible, with

reference to the steps to be taken by plaintiffs and defendants in the prosecution of their rights. Commencing with the jurisdiction of the county courts and shewing when a plaintiff ought to sue in these courts, and when he has the option, without risk as to costs, of suing in the superior courts, the steps to be taken to sue out a summons are next considered. This is followed by a statement of the powers and duty of a defendant on service of the summons. The subsequent steps immediately before and at the trial, down to judgment and execution, are stated, as well as the incidental proceedings on an application for a new trial and on appeal."

The other parts of the work (which are, indeed, the main subject of the volume) treat of the rules of evidence in general, and of their application—1, to actions on contract; 2, for torts; 3, replevin; 4, proceedings to recover tenements; 5, interpleader claims. It should be mentioned that these parts embrace numerous sub-divisions, which our space does not allow us to mention, but which we may briefly and comprehensively describe as being those subjects of which works on evidence usually treat. And the work of Mr. Davis may justly be said to be useful to the student and practitioner, independently of its application to the county courts, for it contains much information of the best and most recent kind upon matters of great practical importance. Indeed we know of no work of its size which can be so useful to the student or practitioner desirous of knowing what the common law is at the present time. An appendix contains all the acts and rules relating to the county courts and the practice, which will be found extremely useful for reference. On a future occasion we shall state more in detail the subjects treated of by Mr. Davis, and give some extracts, which will, we are satisfied, convince our readers that the production of Mr. Davis is of a very meritorious kind.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

SOLICITOR.—*Lien of a solicitor.—Tenant for life and remainder-man.*—It is settled, both on principle and authority, that a solicitor cannot claim a lien against parties not claiming through the party who created the lien. The defendant, a solicitor, had been employed by an executrix, who was also tenant for life, to conduct her defence in a suit instituted against her by parties entitled in remainder, and who sought to restrain her from disposing of the trust estate. Before the cause came to be heard the executrix died intestate, and letters of administration *de bonis non* were granted to one of the parties entitled

in remainder, against whom the suit was revived, and a common administration decree taken, but it was not revived against the legal representatives of the executrix. The executrix had placed in the hands of her solicitor deeds and papers relating to the trust estate, possession of which was claimed by the plaintiff, and the defendant refused to deliver them up, alleging that he had a lien upon them in respect of his costs: Held, that he had no lien upon them, and he was directed to deliver them up. *Turner v. Letts*, 1 Jur. N. S. 486.

EQUITY PRACTICE.

SOLICITOR AND CLIENT.—*Right to letters and copies.*—This case came before the Master of the Rolls. The petitioner had changed his solicitor, and required his first solicitor to deliver up—1, all original letters received by him from third parties as solicitor in the suit, and relating exclusively to the client's business; 2, the copies kept of letters by the solicitor on his client's business: Held, 1, that the solicitor may keep the letters written to him by the client himself, but is bound to deliver up, without charge, letters received by him from third parties relating exclusively to the client's business; 2, that the client is entitled to copies of letters written by the solicitor on the client's business, upon paying for such copies, but not otherwise. *Re Thompson*, Week. Rep. 1854-55, p. 474; 25 Law Tim. Rep. 138.

COMMON LAW.

ASSAULT AND BATTERY.—*False imprisonment.—Constable who sees a breach of the peace instantly takes up private person.*—Where a breach of the peace is committed under the eyes of a constable it is lawful to him, and even his duty, to arrest the offender, and when a private person who sees the breach of the peace calls upon the constable to do his duty, and even goes so far as to say: "your duty is to arrest this man, and I give him in charge," and the policeman, in pursuance of the charge, *molliter manus imposuit*, and took him before a magistrate, neither the constable nor the bystander is liable in trespass. *Derecourt v. Corbishley*, 25 Law T. 157.

CERTIORARI.—*Bye law for non-removal of snow.—Confirmation by the Secretary of State.*—By the Public Health Act, sec. 88, the local board is empowered to make bye-laws for the removal of dust, ashes, rubbish, filth, dung, manure, and soil. Sec. 115 provides that no bye law shall be in force until confirmed by one of the secretaries of state, and by sec. 137, no rate nor any proceeding concerning the conviction of any offender against this act, nor any order, award, or other matter relating to this act, shall be removeable by certiorari into any of the superior courts. By the authority of this act a bye

law had been made, and allowed by one of the secretaries of state, requiring the occupiers of houses of B., Staffordshire, once in twenty-four hours to remove snow and other obstructions from the foot-path in front of the premises: Held, that pure snow is not within these words; that the confirmation of the bye-law by the Secretary of State did not preclude the justices from inquiring into the validity of the bye-law, and in acting on the assumption that they had no authority to consider whether it was bad, they committed an excess of jurisdiction as would warrant a certiorari, although it is taken away by the act for certain purposes. *Ex parte M. Wood*, 25 Law Tim. Rep. 127.

COLLISION.—*Preponderance of blame*—14 & 15 Vic. c. 79.—In an action by the owners of a collier against the owners of a steam vessel for injury caused by a collision, the jury had found—1, that there was fault on the part of the collier in not continuing to hold up a light according to an Admiralty regulation until the danger was past; 2, that the steamer was going at too great a speed on so dark a night, in which respect there was a want of caution; 3, that the preponderance of blame was with the steamer upon a plea of not guilty: Held, that the finding amounted to a verdict for the defendant upon the authority of 14 & 15 Vic. c. 79, which enacts, that if, in any case of collision between two or more vessels, it appears that such collision was occasioned by the non-observance of the rules made by the Court of Admiralty, in respect of the exhibition of lights, the owner of the vessel by which any such rules has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such vessel in such collision, unless it appears to the court that the circumstances of the case were such as to justify a departure from the rules. *Dowell v. General Steam Navigation Company*, 25 Law Tim. Rep. p. 158.

COPYRIGHT.—*Piracy*.—Sec. 45 of 5 & 6 Vic. c. 45, gives an action for piracy, where any person shall print, or cause to be printed, for sale or exportation, any book in which there shall be a subsisting copyright, without the consent in writing of the proprietor. By the 18th section, in order to obtain a property in the composition of a periodical, the proprietor employing third persons to write for him must employ them on the terms that the copyright therein shall belong to such proprietor: Held, that these terms need not be expressed, but may be inferred from the nature of the employment, and of the thing done. *Sweet and others v. Benning and Lovell*, 25 Law Tim. Rep. 180; Jurist, R. N. S. 543.

MASTER AND SERVANT.—*Damages—Responsibility*.—Where A. is employed by B. to do work for him under the superintendence of B.'s servant, and

A. does something contrary to the direction of the superintendant, whereby an injury is caused, the employer is not liable for the damages. *Stell v. South-Eastern Railway Company*, 25 Law Tim. Rep. 129.

COMMON LAW PRACTICE.

AFFIDAVITS.—*Affidavits in answer to new matter*—*Protection order*, 7 & 8 Vic. c. 70, s. 6.—The 45th sec. of the C. L. P. Act, 1854, provides that upon motions founded upon affidavits it shall be lawful for either party, with leave of the court or a judge, to make affidavits in answer to those of the opposite party, upon any new matter arising out of such affidavits. It has been determined that, under the above section, the court will not grant leave to a party to make affidavits in answer to those of the opposite party until the case has been so far heard as to enable the court to see from the facts that there is new matter requiring to be answered. *Semble*, the communication which counsel may make to each other of affidavits they intend citing is only made out of courtesy, and the counsel to whom affidavits are so handed ought not to shew them to their client. *Semble*, also, that an order for protection against arrest under 7 & 8 Vic. c. 76, s. 6, is inoperative only as against the particular creditor whose debt has been contracted by reason of any breach of trust. *Hayne v. Robertson*, 1 Jur. N. S. 526.

ARREST.—*Affidavit to hold to bail*—1 & 2 Vic. c. 110, s. 8.—Application was made to set aside an order to hold a party to bail under the 3rd section of the above statute, which authorises the order, if a plaintiff shall show by affidavit, to the satisfaction of a judge, that there is probable cause for believing that the defendant is about to quit England, unless he shall be forthwith apprehended. The order had been obtained upon an affidavit intituled: A. B., plaintiff, and C. D., defendant, stating that the said defendant, C. D., was indebted unto the said plaintiff in the sum of £—, being the balance of account for railway shares sold by him unto the said C. D., and that he had been informed by the said C. D., that he was about to leave England, and going to reside permanently abroad. There was also an affidavit of the clerk to the plaintiff's attorney that a writ of summons was sued out in that court at the suit of the plaintiff against the defendant on, &c.: Held, 1st that an objection to the title of the affidavit which names the cause ought not to prevail; the putting the names of the parties at the top of it is surplusage, and does no harm. 2. As to the second objection, that the plaintiff's affidavit stated that the shares were sold, but not that they were delivered: Held, that sec. 8 of stat. 1 & 2 Vic. c. 110, is not confined to actions for debt; it applies to actions for damages, and, therefore, the affidavits

need not state that the shares were sold as well as delivered (*Hopkins v. Vaughan*, 12 East, 398; and *Loisada v. Morioseph*, 8 Moo, 366; *Lascar v. Morioseph*, 1 Bing. 357) in which it was held that a defendant could not be held to special bail on an affidavit stating him to be indebted to the plaintiff for goods bargained and sold, without also saying delivered; did not apply under our statute. 3. There is nothing in the objection that the party does not express his belief that the debtor will go abroad unless he is forthwith arrested. The making of the order is not dependant upon the belief of the plaintiff, but upon that of the judge.—Rule refused, *Hargreaves v. Hayes*, 1 Jurist N. S. 521.

ATTORNEY.—Misconduct—Felony.—Where an attorney is employed in a cause and becomes guilty towards his client of misconduct amounting to a felony, the court will not in a summary way call upon him to answer the matters in the affidavit. It is an indictable offence. But where the matter arises in the course of a cause, the court cannot help interfering to have justice done in the cause. *Anonymous*, 25 Law Tim. Rep. p. 161.

ATTORNEY.—Steward of manor liability to account.—An attorney may be called to account, on a summary application, for sums received by him only when he has acted in the relation of attorney; but where an attorney having been employed as steward of a manor the court will not grant a rule to call him to account for fines and quit rents received by him as steward. *Anonymous*, 25 Law Tim. Rep. p. 161.

TRIAL.—Right of counsel to sum up—Non-suit—C. L. P. A. 1854, s. 18.—The 17 & 18 Vic. c. 125; s. 18, provides that the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time at the close of such case for the purpose of summing up the evidence: it was held under this section that where the judge, at the trial, after the conclusion of the plaintiff's case, decides that there is no evidence, his counsel has no right to sum up the evidence. *Hodges v. Ancrasy and Another*, Week. R. 1854-55, 318; Jurist, N. S. p. 547.

BANKRUPTCY AND INSOLVENCY.

ATTACHMENT OF DEBTS.—C. L. P. A., ss. 61—62, 63, 64, 65—Bankruptcy of the debtor—Title of assignees—Security of a creditor under sec. 184 of Bankrupt Act.—Sec. 60—67 of the C. L. P. A. 1854 (17 & 18 Vic. c. 125), for enabling a judgment creditor the more effectually to enforce his judgment against his debtor allows him to attach in the hands of a third person, called the garnishee, the debts

due to his debtor. By sec. 62, the service of an order to attach such debts, or notice thereof to the garnishee, binds the debts in the hands of the latter. By sec. 63, if the debts are not paid, or be not disputed, the judge may order execution, and by the 64th sec., if the debt be disputed, process in the nature of a writ of revivor under the C. L. P. A., 1852, to obtain execution against the garnishee, may be authorised. The first question which occurred under these sections before the Q. B. was whether such an order served upon the garnishee changes the property, and it was decided that, although it prevents the debtor from dealing with the debt, it has no greater effect than the delivery of the writ to the sheriff under the Statute of Frauds; for the understanding of the second question the 184th section of the Bankrupt Act must be recalled to the mind. By that section creditors having security for their debts, or having made any attachment by virtue of any local custom, are placed in the situation of the general unsecured creditors, and shall come *pari passu* with them except in respect of an execution served and levied by seizure and sale upon or in respect of any mortgage of, or lien upon, any part of the property of the bankrupt. In interpretation of this section it was held, that where a judgment creditor obtains and serves an order of attachment upon the garnishee, and the debtor becomes afterwards a bankrupt, the judgment creditor has a security for his debt within the 184th section of the Bankrupt Act, but has no "mortgage" or "lien" so as to give him a preference over the assignees, and entitle him to receive more than a rateable portion of his debt. *Holmes v. Tutton*, 25 Law Tim. Rep. 177.

INSOLVENCY.—Substitution of new assignee as plaintiff.—The 53rd section of the 1 & 2 Vic. c. 110, anticipating the case where it becomes necessary to substitute an assignee in the place of another, enacts that wherever any such assignee shall be appointed in pursuance of the provisions of the act, no action at law or suit in equity shall be thereby abated; but the court in which any action or suit is depending may, upon the suggestion of such death or removal, and new appointment, allow the name of the surviving, or new assignee to be substituted in the place of the former. A suit had been instituted by a plaintiff as assignee of an insolvent debtor; the appointment of the assignee was irregular, but his title was not disputed by the defendant, and he had also been treated by the court as assignee: Held, that an assignee of the insolvent subsequently appointed will be taken conclusively for the purposes of the suit to be a new assignee, within the 53rd section of 1 & 2 Vic. c. 110. *Sladden v. De Lasaux* Week. Rep. 1854-55, 499.

ADMINISTRATIVE REFORM

We regret to say that the resolution moved by Mr. Layard on the reform of the administration, the importance of which we urged in our last number, was defeated. The Government escapes the plain declaration of Mr. Layard, that "merit and efficiency have been sacrificed in public appointments to party and family influences, and to a blind adherence to routine;" but the country is not less convinced of the fact because the House of Commons has refused its affirmation. There is plenty of talent in England seeking for a career. Let the civil service cease to be a refuge for incapacity. The same may be said of the army and of the diplomatic service—abolish purchase in the one and open the other, and there will be no lack of fit men to put in the right places. The attempt, nevertheless, may not be quite considered fruitless. Lord Palmerston pledged himself to "a careful revision of our various official establishments, with a view to simplify and facilitate the transaction of public business; and by instituting judicious tests of merit, as well as by removing obstructions to its fair promotion and legitimate rewards, to secure to the service of the State the largest available proportion of the energy and intelligence for which the people of this country are distinguished." If the work is henceforth carried in the spirit of the recommendation, we can rest satisfied.

ANSWERS TO MOOT POINTS.

No. 93.—*Description of Deponent* (vol. 1, p. 423).

In the case of the Queen v. Chapman the prisoner was found guilty of a misdemeanor for falsely stating in the commencement of an affidavit (sworn before a surrogate) that his name was Baker, and that his intended wife had lived in the parish for fifteen days then last. Lord Denman speaks of it as the "false oath," although he is doubtful whether perjury can be assumed, but in this last I imagine he was referring more to the authority of the surrogate than to the particular part of the affidavit which was untrue.

H. WOOD (Yeovil).

No. 96.—*Partnership—Loss* (vol. 1, p. xlii).

I assume that in this case M. not only agreed to lend the innkeeper certain monies, but actually did so. Such being the case, they would be partners, and M. would be liable. According to Sir William Blackstone, the true criterion (where money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan, in the latter a partnership. If, however, M. had merely agreed to lend him the sum, the case would have been different, for

according to Addison on Contracts, p. 747, an agreement to subscribe toward the formation of a joint capital and stock in trade, and to divide profits, will not amount to a present partnership.

H. WOOD (Yeovil).

No. 96.—*Partnership—Loss* (vol. 1, p. 423).

Community of profit is the criterion whereby to ascertain whether a contract be really one of partnership, for one partner may stipulate to be free from loss, and the stipulation will hold good as between himself and his companions, though it will not diminish his liability to strangers (*Waugh v. Carver*, 2 H. Bl. 235; 1 Smith's L. C. 491). For by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts (*per C. J. Eyre*, *Waugh v. Carver*, *Berry v. Nesham*, 16 L. J. C. P. 21.); and on this ground it is that a dormant partner, that is to say, one who is a sharer in the concern, but does not appear to the world as such, is held responsible for its engagements (*Robinson v. Wilkinson*, 3 Price, 538; *Wintle v. Crowther*, 1 Cr. and J. 316; 1 Tyr. 210; *Smith's Merc. Law*, by Dowdeswell, pp. 19, 20). An agreement to share profits alone raises a liability in point of law to losses with respect to creditors (2 Stark. Ev. 583). I am clearly of opinion that M. is liable for any loss which may arise from the innkeeper's (his partner's) negligence, and the agreement for the sharing of the profits constitutes a partnership *inter se*. It is not necessary that a partner's share should be ascertained.

GULIELMUS T. (Hexham).

No. 97.—*Administrator—Lessee—Heir* (vol. 1, p. 423).

Such an acceptance would not confirm the tenancy of the lessee (*Griffin v. Langfield*, 3 Camp. 254, *Ellenborough*).

H. WOOD (Yeovil).

No. 98.—*Husband and Wife, &c.* (vol. 1, p. 424).

The reason that D. had no claim to the surplus was that his wife had never been seized of the property mortgaged, and therefore he could not take as tenant by curtesy.

H. WOOD (Yeovil).

No. 98.—*Husband and Wife—Mortgage of Wife's Lands with Power of Sale* (vol. 1, p. 424).

If man and wife mortgage an estate, of which the former is seized *de jure uxoris*, the equity of redemption follows the same course as the estate (if unencumbered) would have done, that is, on the death of the wife, it descends to her heirs (1 Roper on Husband and Wife, 154, and the cases there cited). Therefore, if the mortgage deed referred to contained the usual clauses only, E., the mortgagee, was advised rightly, the equity of redemption and consequent right to receive the balance of the proceeds of the sale of the mortgaged estate being in the infant heir of C. to the exclusion of D.

R. E. P.

No. 100.—*Bankruptcy Assignees—Joint Tenancy or not* (vol. 1, p. xliii).

It appears settled on authority that the trade and official assignees are joint tenants (*Mann v. Ricketts*, 9 Jur. 1108), and, therefore, on the death of the trade assignee, *and no new one appointed*, I apprehend that the official assignee would be in a position to give a valid conveyance.

J. H. MILLINGTON.

No. 100.—*Bankruptcy assignee—Joint tenancy or not* (vol. 1, p. xlii).

It appears to me that the official and trade assignees of a bankrupt do take as joint tenants. Mr. Shelford observes (*Notes on Consolidation Act*, p. 244) that it was decided in *Man v. Ricketts*, 1 Phill. C. C. 617 (see also *Lloyd v. Waring*, 1 Coll. C. C.; *Archb. Bankr.* by Mr. Flather, pp. 215, 442, 478) that such was the effect of the 25 & 26 ss. of 1 & 2 Will. 4, c. 56. Though this act was repealed by the Consolidation Act, the section referred to is repeated almost *verbatim* in the 142nd section of the latter act. It seems, however, that the legislature did not contemplate a conveyance of the real estate of the bankrupt by the official assignee alone, for the 40th section of the Consolidation Act only permits him, before the appointment of the trade assignees, to dispose of such property of the bankrupt as may be of a perishable nature, even with the special authority of the court. In favor of this view there is also the general inference to be drawn, from the fact that it is to protect the interests of the creditors that trade assignees are appointed, their sanction being required to all acts in which the interests of the creditors are concerned. Surely, then, it could not be intended to place no check on a transaction in which the interests of the creditors are so deeply concerned as an improvident sale of the realty by the official assignee, simply if it was made after the death of the trade assignee instead of prior to his appointment. I would therefore submit that the official assignee referred to is, by virtue of his *jus accrescendi*, solely seised, but that he cannot convey until the election of a new trade assignee.

R. E. P.

No. 101.—*Copyhold Grant—Feoffment* (vol. 1, p. xlii).

I should think there can be no doubt that the grant of the piece of freehold land, accompanied by the ceremony of livery of seisin, will operate as a feoffment. By the Statute of Frauds (20 Car. 2, c. 3) the donation must be expressed by some instru-

ment in writing under the signature of the feoffor (1 Steph. Com. p. 222, 2nd edit.).

GULIELMUS T. (Hexham).

No. 102.—*Party to a Deed—Legal Estate* (vol. 1, p. xlii).

E. F. would take an immediate estate in the use (*Shelford's Real Property Stats.* p. 539, n. 5th edit. *Burton's Compendium*, 442, n).

K. Y. Z.

No. 103.—*Executor preferring Creditor after Suit* (vol. 1, p. xlii).

It is a well known principle of law that an executor must pay all specialty debts before simple contract debts. An executor also has the power of preferring one creditor before another among equals, but this power may be sometimes restrained by proceedings at law or in equity, for if judgment be obtained by a creditor in an action, his debt must be satisfied first, and if an action be even only commenced he cannot voluntarily pay another before judgment given and debt satisfied. A decree of the court of equity is of the same force as judgment at law; therefore, if a creditor proves his debt and has a final decree, his decree must be satisfied first, and if a creditor sues an executor for administration of estate for himself and all other creditors, and a decree be obtained, this is a judgment for all creditors, and the executor loses all power of preference among the creditors of equal degree; but as to a bill being simply filed it clearly appears that this will not preclude the executor from voluntarily paying the debts of other creditors of the same degree, and this will make no difference whether a bill be filed for the administration of the estate or for the debt of the suing creditor alone (*Darston v. Lord Oxford*, Prec. Chan. 188; *S. C.* in error, *Colles*, 229; *Maltby v. Russell*, 2 Sim. and Sta. 227; and *Mitchelson v. Piper*, 8 Sim. 64).

A. H. MORTON (Louth).

No. 104.—*Obstructing Lights by Building* (vol. 1, p. xlii).

To give a man an absolute and indefeasible right of air and light through his windows overlooking another man's land it is necessary, by 2 & 3 Wm. 4, c. 71, s. 2, that he should have twenty years' enjoyment thereof without interruption; therefore I think as A.'s house has only been standing two years, A. cannot sue B. for obstruction of light, but, moreover, that B. can make A. take the windows out again (*Flight v. Thomas*, 11 Ad. and Ell. 688).

A. H. MORTON (Louth).

A SOLICITOR'S LIBRARY.

Having been requested by several subscribers to give a list of such works as would be likely to be useful to practising solicitors, we have essayed to comply with such request, though we have found the task a more difficult one than we had anticipated. It must be understood that all we have attempted has been to point out such works as would be likely to be serviceable to practitioners in general, for it is impossible to adapt our recommendations to the peculiar position of each individual practitioner. Something useful will, we think, be found, which will enable those who may be desirous to purchase any works on the law to make a selection of such as may appear to be most suited to their wants. In order to increase the value of our recommendations we have added to many of the works some remarks and criticisms with which we have met, and which will, perhaps, give a more accurate notion of the value of the works.

We shall divide the various works into—1, abridgments or digests and statutes; 2, text-books or treatises; 3, reports. Before noticing the various abridgments of the law, we may observe that various opinions as to their utility exist, which, with some cautions respecting them, we shall here notice:—"Take heed, reader, of all abridgments, for the chief use of them is, as of tables, to find the book at large; but I exhort every student to read and rely only on the books at large" (5 Coke's Rep. 25). "This I know, that abridgments, in many professions, have greatly profited the authors themselves, but, as they are used, have brought no small prejudice to others, for the advised and orderly reading over of the books at large, in such a manner as I have elsewhere pointed out, I absolutely determine to be the right way of advancing to perfect knowledge, and to use abridgments as tables, and trust only to the books at large, for I hold him not discreet that will *sectari rivulos*, when he may *petere fontes*" (Preface to 4 Co. Rep.). "I had once intended, for the ease of our student, to have made a table to these institutes, but when I considered that tables and abridgments are most profitable to them that make them, I have left that work to every studious reader" (Co. Litt. Last Words). Notwithstanding what my Lord Coke says, abridgments are useful, we might add, in the present state of law reports, indispensable. The reader, however, must be cautious in placing too much reliance on them, and should where practicable, consult the original references for practical purposes.

Bacon's Abridgment.—We would recommend every one to provide himself with Bacon's Abridgment. It is a repertory of useful information. It may be No. 15 (Vol. II.)

obtained second-hand for about £3. The last, which is the seventh edition, corrected with large additions was published in 1832, bringing the cases and statutes down to 1831; but vols. 2, 3, and 4, have this done in an addenda only, whilst in the other volumes the additions are incorporated. The last edition is by Mr. Dodd, with Sir H. Gwillim's labours bestowed on the former editions. In Kent's Com. it is said:—"This was composed chiefly from materials left by Lord Chief Baron Gilbert. It has more of the character of an elementary work than Comyns' Digest. The first edition appeared in 1786, and was much admired, and the abridgment has maintained its great influence down to the present time, as being a very convenient and valuable collection of principles arising under the various titles in the immense system of the English law." (1 Kent. Com. 510). "With respect to the husband's interest in the wife's chattels real and choses in action, an accurate, and so far as it goes, a masterly explanation of it is given in Bacon's Abridgment, vol. i., p. 268." Co. Litt. 209 a, n (9). The title "Remainder and Reversion," occupying the last hundred and sixty pages of volume six of the last edition, is from a manuscript treatise of Lord Chief Baron Gilbert, and is esteemed an admirable treatise. Indeed, the greater part of the original work is supposed to have been compiled from materials collected by C. B. Gilbert.

Comyn's Digest.—We would also recommend that Comyns' Digest should be purchased. An old edition can be had for a few shillings, and even Mr. Rose's for about one guinea and a half, whilst that of Mr. Hammond (undoubtedly the best as also the latest) can be had for about £4 or £5. This digest is useful for reference, as from its extreme conciseness it contains an infinity of points. It is also of great authority. This digest being founded on an entirely new and comprehensive system of arrangement, and framed upon an accurate, profound, and scientific distribution of the several parts of our jurisprudence, is esteemed the most perfect model of an abridgment. The method of digesting the substance of the several cases being very close and concise, the use of this work is (it is said) more particularly advantageous to the experienced barrister, in furnishing a ready reference to the cases as recorded at large in the books of reports and other authorities. Mr. Hargrave has observed (Co. Litt. 17a, note) that the whole of Comyns' Digest is equally remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution, but that the title "Pleader" seems to have been the author's favourite title. Mr. Wooddeson, speaking of the work says:—"The Digest of Lord Chief Baron Comyns deserves to be mentioned with particular

encomiums. In this admirable collection the usual method pursued of conveying the doctrine on any subject is, to set down a general position, then to illustrate it by examples, and finally to restrain it by exceptions; all which is done with remarkable clearness and conciseness of expression, and the information desired is seldom long sought after or in vain" (Wooddeson's Elements, 176). And Justice Kent says:—"Comyns' Digest is a production of vastly higher order and reputation than Viner's, and it is the best digest extant upon the entire body of the English law. Lord Kenyon held his opinion alone to be of great authority, for he was considered by his contemporaries as the most able lawyer in Westminster Hall (3 Term Rep. 64, 631). The title Pleader has often been considered as the most elaborate and useful head of the work, but the whole is distinguished for the variety of the matter, its lucid order, the precision and brevity of the expression, and the accuracy and felicity of the execution" (1 Kent Com. 510). The work is very frequently indeed quoted in the arguments of counsel, and its authority allowed by the court, and some of the judges have not scrupled to give almost judicial weight to those portions which can be clearly shown to contain Comyns' own opinion. "A book of very excellent authority" (1 Mau. and Selw. 363. And see 1 Barn. and Ald. 713, and 8 Price, 61). Lord Kenyon, relying on an opinion of Comyns in the Digest, but for which no authority was cited, said:—"Though no authority is referred to in support of it, yet the opinion of so able a lawyer is of great authority" (3 Term Rep. 631). The same judge says:—"He has not, indeed cited any authority for this opinion, but his opinion alone is of great authority; since he was considered by his contemporaries as the most able lawyer in Westminster Hall" (3 Term Rep. 64). Best, C. J., speaking of a proposition in Comyns' Digest, observes:—"This he lays down on his own authority, without referring to any cases, and I am warranted in saying we cannot have a better authority than that learned writer" (5 Bing. 387, 388).

Viner's abridgment.—We would also recommend Viner's abridgment, as containing an extremely copious body of old law; but it is not indispensable, particularly for those who have Comyns and Bacon. There have been two editions of this work, the last in 24 vols. royal 8vo., 1791—1794. In addition there is a supplement in 6 vols. 8vo., 1799—1806, by Messrs. Watson, Comyn, Sedgwick, Alcock, Wyatt, Humphreys, Anstruther, and Nolan. Mr. Viner had the original edition not only printed under his own inspection at his house in Aldershot, in Hants, but the paper was also manufactured under his direction, as appears by a peculiar watermark,

describing the number of the volume, or the initials of C. V. Mr. Viner began at the title "Factor," where D'Anvers left off, and published to the end of the alphabet; he then proceeded to title "Abatement," but by his index he directed the volumes to be placed in alphabetical order. Some of the criticisms on Viner we here append. "The abridgment of Mr. Viner is the most copious, and is enriched with the publication of several determined cases, either not at all, or generally speaking, not so fully and accurately reported elsewhere" (Wooddeson's Elements, 175). "Brother Viner is not an authority. Cite the cases that Viner quotes—that you may do" (per Foster, J., 1 Burr. 364). "A most valuable, but shapeless mass of law" (Notes to North's Study of the Laws, p. 76). "Viner's abridgment, with all its defects and inaccuracies, is a convenient part of every lawyer's library. We obtain by it an easy and prompt access to the learning of the Year Books and the old abridgments, and the work is enriched with many reports of adjudged cases, not to be found elsewhere; but, after all that can be said in its favour, it is an enormous mass of crude undigested matter, and not worth the labour of the compilation" (1 Kent Com. 510). These may be considered as general abridgments, because they embrace more than one department of the law, though Bacon is considered as best for conveyancing, and Comyn for pleading. We now proceed to mention some other more modern abridgments, among which are Cruise, Crabb, and Chitty for real property; Petersdorff and Harrison for common law; and Chitty's Equity Index for equity.

Cruise's Digest.—Cruise's Digest is too well known to require any lengthened notice. It is a decidedly useful work. The last edition by Mr. H. H. White appeared in 1835, in 7 vols. price £5 12., but it may be purchased for about £2 10. We should think it cannot be long before another edition is issued, though we cannot speak to this for a certainty. The last edition comprises references throughout the work to the principle decisions, and to the various acts affecting the law of real property since the preceding edition of 1824, together with a new chapter by the editor on Merger. This work is too well known to require any commendation from us. "The perusal of this digest, though laborious, will be found of the highest use. It is a valuable *institutionary* work, and will render the reader's mind sufficiently familiar with the doctrines of real property to enable him with advantage to attack the older writers" (Notes to North's Study of the Laws, p. 72).

(To be continued.)

RECENT STATUTES, 18 & 19 VICTORIA.

[Continued from Vol. I., p. 429]

We intend to present our readers with a review of the legislation of the session. All the acts relating to the United Kingdom, or to England, will be given fully, or carefully abridged, according to their practical utility and bearing on the administration of justice and the administrative functions.

CAP. I.—*Militia—Foreign service.*—This act provides effectual measures for the vigorous prosecution of the war, and enables Her Majesty's government to accept the services of the militia out of the United Kingdom, under the regulations and restrictions specified in this act. The commanding officers are to explain that the offer is to be voluntary. Her Majesty is empowered to form the militia for extended service into such provisional regiments or battalions as may be deemed most expedient for Her Majesty's service, and to appoint field officers to such provisional regiments. The militia on extended service shall be subject to the Mutiny Act. Any person who shall have served subaltern in the militia for five consecutive years may, without any property qualification, be appointed a captain in the militia.

CAP. II.—*Foreign enlistment.*—By the provisions of this act foreigners may be enlisted into Her Majesty's service, and commissions may be granted to foreigners to be formed into separate corps. The men serving under this act shall not be more in the whole than 10,000 in the United Kingdom; they shall not be employed in this country, except for being trained for foreign service; and they shall not be billeted or quartered on any person. They shall be subject to the Mutiny Act and Articles of War. No officer serving under this act, when reduced, shall be entitled to half-pay.

CAP. III.—*North American fisheries.*—By a treaty of the 5th of June, 1854, between Her Majesty and the United States of America, the difference which had long existed between the two countries about the North American fisheries, and which threatened to bring on a rupture, was settled by clear demarcation of the localities where the inhabitants of the United States and the subjects of Her Majesty will have in common the liberty to take fish.

CAP. IV.—*Army enlistment.*—This act amends the therein recited acts (10 & 11 Vic. c. 37, ss. 2, 3, 4; and 12 & 13 Vic. c. 73) which authorised enlistment for ten years in the infantry and twelve years in the cavalry, artillery, or other ordnance corps, and provided for re-enlistment for terms of eleven, twelve, and nine years, and introduces a further enactment to permit enlistment or re-enlistment for any shorter time.

CAP. V.—*Consolidated Fund, No. 1.*—An act to supply the sum of £3,800,000 out of the Consolidated Fund, to the service of the year ending 31st March, 1855.

CAP. VI.—*Consolidated Fund, No. 2.*—An act to apply the sum of £20,000,000 out of the Consolidated Fund to the service of the year 1855.

CAP. VII.—This act extends to *Ireland*, the provisions of the 18th sec. of the *C. L. P. A.*, 1854, enacting, that whenever any cause shall be tried in any court of civil jurisdiction in *Ireland* by any jury, the addresses to the jury shall be regulated as follows, that is to say, the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time, for the purpose of summing up the evidence, and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any) and the right to reply shall be the same as at present.

CAP. VIII.—*Exchequer Bills, No. 1.*—An act for raising the sum of £17,183,000 by Exchequer Bills for the service of 1855.

CAP. IX.—*Tea Duties Decline Suspension Act.*—In lieu of the several duties of customs made payable on tea by the 16 & 17 Vic. c. 106, this act provides that the duty levied until twelve months after a definitive treaty of peace, shall be 1s. 6d. per pound; from thence until the expiration of the ensuing twelve months, 1s. 3d. per pound; and thence after, 1s. per pound.

CAP. X.—*Parliament—Secretary and Under Secretary of State.*—This act empowers a third Principal Secretary and a third Under Secretary of State to sit in the House of Commons.

CAP. XI.—*Mutiny and desertion.*—After reciting that it is adjudged necessary by Her Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom, the defence of the possessions of Her Majesty's crown, and the preservation of the balance of power in Europe, and that the whole number of such forces should consist of 193,565 men, exclusive of the officers and men employed in India. This act, among other provisions, organises general and special courts-martial, the proceedings at trial, sec. 14; enumerates the crimes punishable with death, sec. 19; gives power to inflict corporal punishment and to commute it, ss. 25 & 26; to forfeit the pay for drunkenness, ss. 31 & 32; organises military prisons, their discipline. The other sections, which it may not be amiss to point out in this extensive statute are, sec. 51, no person acquitted or convicted by the civil magistrate or by a jury is to be tried

by court-martial for the same offence; sec. 52, soldiers are liable to be taken out of Her Majesty's service only for felony, misdemeanors, or for debts amounting to £30 and upwards; sec. 83, ordinary course of criminal justice not to be interfered with—punishment of officers obstructing civil justice.

CAP. XII.—*Marine Mutiny Act*.—For the regulation of her Majesty's royal marine forces while on shore.

CAP. XIII.—*Lunacy Regulation Act Amendment*.—It recites that by sec. 129 of the 16 & 17 Vic. c. 70, entitled an Act for the Regulation of Proceedings under Commissions of Lunacy, and the Consolidation and Amendment of the Acts respecting Lunatics so found by inquisition, and their estates, it was enacted, that where a lunatic is seised or possessed of or entitled to land in fee or in tail, or to leasehold land for an absolute interest, and it appears to the Lord Chancellor, intrusted as in the said act mentioned, to be for his benefit that a lease or underlease should be made thereof for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or otherwise improving the same, or for farming or other purposes, the committee of the estate may, in the name and on behalf of the lunatic, under order of the Lord Chancellor, intrusted as aforesaid, make such leases of the land or any part thereof, according to the lunatic's estate and interest therein, and to the nature of the tenure thereof, for such term or terms of years, and subject to such rents and covenants as the Lord Chancellor, intrusted as aforesaid, shall order. And that it has been considered that the Lord Chancellor, intrusted as aforesaid, cannot by force of the said enactment empower the committee of a lunatic tenant in tail to grant leases as extensively as was intended by the said enactment, which will bind his issue in tail and the remainder-men. And that it is expedient to explain and enlarge the power of the Lord Chancellor, intrusted as aforesaid, in the matter aforesaid; and it enacts that, 1st, where a lunatic is seised of or entitled to land in tail, and it appears to the Lord Chancellor, intrusted as aforesaid, to be for his benefit, the committee of the estate may, in the name and on behalf of the lunatic, under order of the Lord Chancellor, intrusted as aforesaid, make any such leases of the land or any part thereof as in the said section of the said act are mentioned, and every such lease shall be good and effectual in law against the lunatic and his heirs, and all persons claiming the lands entailed by force of any estate tail which shall be vested in such lunatic, and also against all persons, including the Queen's most excellent Majesty, her heirs and successors, whose estates are to take effect after the determination of

or in remainder or reversion expectant upon such estate tail, according to such estate as is comprised and specified in every such lease, in like manner as the same would have been good and effectual in law if the lunatic at the time of the making of such leases had been lawfully seised of the same lands comprised in such lease of a pure estate in fee simple to his own use, and had been of sound mind, and not the subject of a commission of lunacy, and had himself granted such lease; and every person to whom from time to time the reversion expectant upon the lease shall belong after the death of the lunatic shall and may have such and the like remedies and advantages, to all intents and purposes, against the lessee, his executors, administrators, and assigns, as the lunatic or his committee might have had against him or them. And the powers given by secs. 130 and 131 of the said recited act shall and are to operate as extensively as the power given by the said section 129 of the said act as explained and enlarged by this act. 2nd. Where any of the expressions in this act are used in the said recited act they shall receive the same interpretation in this act as by the said recited act is imposed upon them.

CAP. XIV.—*Inclosure Act, 1855, No. 1*.—An act to authorise the inclosure of certain lands in pursuance of a report of the Enclosure Commissioners for England and Wales.

CAP. XV.—*Judgments, &c.—Protection of purchasers*.—We refer our readers to vol. 1 Law Chron. p. 427—429, which contains in extenso the provisions of this important statute.

CAP. XVI.—*Crown lands*.—An act to authorise the letting of certain parts of the hereditary possessions of the crown.

CAP. XVII.—*Sardinia convention*.—An act to carry into effect a convention between Her Majesty and the King of Sardinia, by which the King of Sardinia agrees to furnish and keep up an army of 15,000 men for the present war.

CAP. XVIII.—*£16,000,000 loan*.—An act for raising the sum of £16,000,000 by way of annuities. The contributors shall, for every £100 contributed, be entitled to £100 in the 3 per cent. consols, and to an annuity of 14s. 6d. for thirty years. The act contains several other provisions of little importance about annuities payable half-yearly, to which contributors are liable (sec. 4); a sinking fund, sec. 22. The 26th sec. deserves more attention: it provides that if any person shall be sued, molested, or prosecuted for anything done in pursuance of this act, they shall and may plead the general issue, and give this act and the special matter in evidence in defence.

EXAMINATION ANSWERS.

TRINITY TERM, 1855.

(Continued from p. 14).

EQUITY (*ante*, p. 5).

I. *How proceedings commenced.*—The mode of commencing proceedings in equity is now either by filing a bill or a claim, or by obtaining an order on summons to administer, or by petition.

II. *Compelling answer.*—Where a defendant neglects to put in an answer, the plaintiff, if he desires to have an answer, should proceed to issue an attachment, or to take the bill *pro confesso* (1 Law Chron. 125, 306, 451); if the defendant puts in an insufficient answer the plaintiff should take exceptions thereto.

III. *Demur.*—A bill should be demurred to where the defendant is satisfied that the court would, on the hearing, dismiss the bill, assuming the matters stated to be true, for by a demurrer the defendant for that purpose admits the truth of the plaintiff's allegations (1 Dan. Pract. 497, 2nd edit.).

IV. *Assets—Priorities of different kinds of creditors.*—The question does not distinguish between equitable and legal assets. As to charges and liens, indeed, there is no distinction, for whether the assets be legal or equitable the charge or lien has preference so far as the estate charged is concerned (see 1 P. Will. 429; *Plunket v. Penson*, 2 Atk. 290; *Ram on Assets*, 399). If the assets be equitable then judgment bond and simple contracts are, in general, paid rateably, but there are cases in which judgment creditors have been held entitled to a priority (see *Foley's Case*, 2 Freem. 49; *Wilson v. Fielding*, 10 Mod. 426; *Bothomley v. Lord Fairfax*, 1 P. Will. 334; *Anon.* 3 Salk. 83; the cases are mentioned in *Ram on Assets*, p. 405—408, but note that since then an equity of redemption in fee has been held to be legal assets by Lord Cranworth, *Foster v. Handley*, 15 Jur. 73; 3 Law Stud. Mag. N. S. 66, 67; as to an equity of redemption in a term for years, see the learned discussion in 1 Law Chron. vi, report of Birmingham Law Students' Society). Where the assets are legal the order of payment is—1, judgment creditors; 2, bonds and other specialties; 3, simple contract debts; 4, voluntary bonds. The only priority obtainable *in invitum* by a judgment creditor is by suing out execution: the executor may voluntarily prefer any one (see 2 Will. Exec. 862, 4th ed.; but see *Ram*, p. 371, 2nd edit.).

V. *Irish judgment.*—As a judgment of a foreign court is considered a debt merely by simple contract, so an Irish judgment is not entitled to the same priority as an English one (*Dupleix v. De Roven*,

2 Vern. 540; *Ferguson v. Mahon*, 11 Adol. and Ell. 179).

VI. *Distribution of intestate's effects.*—If an intestate leave a wife and children, the wife will take one-third and the children the other two-thirds; if a wife and collateral kindred, the wife will have one-half and the kindred the other half; if there be a father, and no wife or children, he takes all to the exclusion of other kindred; if there be no father, the mother, brothers, and sisters, and children of a dead brother or sister take an equal share (1 Jas. 2, c. 17, s. 7; 22 Chas. 2, c. 10, ss. 5, 6; *Burt. Comp. pl.* 1401, *et seq.*; *Key*, div. "Conveyancing," p. 146, 3rd edit.).

VII. *Election.*—Election is an equitable doctrine arising where a grantor, or, more commonly, a testator, expressly gives away, either knowingly or by mistake, that in which he has no interest, or the whole of that in which another person besides himself has an interest, and in the same instrument makes a gift to the owner of the property so given away, or to the person entitled to such interest; in which cases the owner or party entitled cannot take both the gift and retain his own property or interest, but must elect to take or reject the gift (*Princ. Eq.* p. 320; *Key*, div. "Equity," p. 37, 3rd edit.; *Schroder v. Schroder*, 18 Jur. 987).

VIII. *Relief in equity.*—The answer (No. I.) given vol. 1, p. 498, will suffice, but it may be observed that discovery of some kind may be had at law under the recent Com. Law Proced. Acts (1 Law Chron. 160, 436, *et supra* Com. Law Ans. No. V.), and legatees may sue in the county courts (see *Winch v. Winch*, 22 Law Journ. C. P. 104; *Longbottom v. Longbottom*, *Id.* Ex. 74; *Davies' Evid.* pp. 338, 340, 2nd edit.).

IX. *Breach of contract for sale of estate.*—Where a contract for sale or purchase of lands is not complied with, the other party may in equity ask for specific performance of the agreement, whilst at law he could, it seems (see 1 Law Chron. 317, 318), obtain damages only (*Princ. Eq.* 181, *et seq.*; *Key*, div. "Equity," p. 42, 2nd edit.).

X. *Death of vendor, purchase money—Death of purchaser.*—Where a vendor of a freehold estate dies before conveyance his personal representative is entitled to the purchase-money. Where the purchaser so dies his heir or devisee will be entitled to have the land, and to have the purchase-money paid out of the personal estate. It is assumed in each case that the contract was binding on the deceased at the time of his death (*Fletcher v. Ashburner*, 1 Bro. C. C. 497; 1 White and Tudor's Leading Cases, 534; *Bennett v. Tankerville*, 19 Ves. 179; *Dart*, 137, 140, 2nd edit.).

XI. *Husband assigning wife's reversionary interests.*

— If a husband assign his wife's reversionary equitable interests in personalty, and he dies before the reversion falls into possession, the wife will not be bound or affected thereby (*Purdey v. Jackson*, 1 Russ. 1; *Princ. Eq.*, 429—434: *Key*, div. "Conveyancing," pp. 95—97, 3rd edit.; *Ashley v. Ashley*, 8 Jur. 1159).

XII. Trust for separate use—Anticipation clause.—Where property is settled for the separate use of a woman, with a provision against alienation, the restriction will prevail whenever she is covert, though discoverd at the time of the making of the settlement, and will continue only during coverture (*Princ. Eq.* 435—440; *Tullett v. Armstrong*, 1 Keen, 428, *Baggett v. Meux*, 1 Phill. 627; *Brown v. Bamford*, *Id.* 620; *Key*, div. "Conveyancing," p. 91, 3rd edit.).

XIII. Lands converted into money, et vice versa.—Where a person has entered into a binding contract for the sale of lands, the same is considered as converted into money, and it belongs to his personal representatives. And a purchaser's money is considered as converted into real estate. The same is the case with regard to an express direction in a will to sell or buy real estate (*Princ. Eq.* 220—222; *Hay. Conv.* 84—87, 4th edit.; *supra*, Answer No. X.).

XIV. Legacies, payable — Interest.—Where no time of payment is mentioned a legacy is payable at the end of twelve months from the testator's death, from which time, if not charged on land, the legatee is entitled to interest at £4 per cent. (2 P. Will. 26, 27; 2 Steph. Com. 207, 3rd edit.). However, where a legacy is given by a parent or person in *loco parentis*, without any provision for maintenance, interest is payable from the death of the testator.

XV. Death of legatee—No lapse.—A legacy to a child or other issue of a testator, where the interest is not determinable before the death of such person, will not lapse by his death before the testator if he leave issue surviving at testator's death (1 Vic. c. 26, s. 33; *Johnson v. Johnson*, 3 Hare, 157; *Key*, div. "Conveyancing," p. 140, 3rd edit.).

BANKRUPTCY (*ante*, p. 5).

I. Creditors—Bankrupt.—By the general law of the country a right is vested in each creditor individually of proceeding to obtain judgment in an action at law for his own debt, and enforcing payment of the adjudged amount against the person or property of his debtor. But as soon as trade began to extend its sphere in this country, this remedy was found defective in the affairs of commerce, which rest, as it were, upon credit, in which consequently the creditors are more liable to be

defrauded. The earliest statute for this purpose (34 & 35 Hen. 8. c. 4, followed by 13 Eliz. c. 7) after having enumerated the offences or acts which were to make a person *bankrupt*, proceeds to direct that such offenders shall be summarily dealt with by a species of commission unknown to the common law, and that their whole effects should be seized and distributed rateably among their creditors; so far, the bankrupt being considered as a criminal, could expect no favor at the hands of the legislature, but at length it appeared harsh to strip a man of all his resources, without at the same time relieving him from his difficulties, to remedy which, 4 Anne, c. 17, was enacted, which first provided to the discharge of the debtor from future liability for the debts then existing. The statutes above referred to were afterwards repealed by 3 Geo. 4, c. 16, which consolidated the different regulations on this subject, but has itself since been repealed by 12 & 13 Vic. c. 106, called "*The Bankrupt Law Consolidation Act*, 1849." By this act the following statutes of date subsequent to 6 Geo. 4, c. 16, are wholly or in part repealed:—1 & 2 Will. 4, c. 56; 1 & 2 Vic. c. 110; 2 Vic. c. 11; 2 & 3 Vic. c. 29; 5 & 6 Vic. c. 122; 7 & 8 Vic. c. 96; 8 & 9 Vic. c. 48; 10 & 11 Vic. c. 102; 11 & 12 Vic. c. 86.

II. Object of bankruptcy laws.—The object of bankruptcy laws is to give commercial transactions more security; stop the credit of a debtor when he can no longer meet his engagements, or he threatens to defraud his creditors; take away his property from his control, and to distribute it among his creditors in general; and as regards the bankrupt himself, the object of these laws is to afford him protection from arrest and also discharge him from prison after a bona fide abandonment of the whole of his estate to his creditors, release him from all debts due by him when he became bankrupt, and, in the language of the law, make him a clear man again.

III. Principal provisions of 12 & 13 Vic. c. 106.—The principal matters introduced by this act, called the Bankruptcy Consolidation Act, into the bankruptcy laws and proceedings are the following: The *fiat* is abolished, and in its place a *petition for adjudication of bankruptcy* is substituted (s. 4); such petition is to be filed in the bankruptcy courts, and not with the Lord Chancellor (s. 90). A primary jurisdiction is vested in the commissioners, while there is (for the most part) only an *appellate* jurisdiction in the Court of Chancery (s. 12), which now, by the 14 & 15 Vic. c. 83, s. 7, is vested in the new Chancery Court of Appeal, from which there is no appeal to the Lord Chancellor. Stamps are imposed on documents used in bankruptcy proceedings in lieu of direct payment by fees (s. 48). Execution against the goods and chattels of the bankrupt, so as

to be protected, must be by seizure and sale, and *bonâ fide*, before the filing of petition, and without notice of prior act of bankruptcy, while, as against his lands, it is sufficient if executed by seizure only (s. 138). Leave of the court is required for the assignees to commence or defend an action at law, and to defend a suit in equity, as well as to commence such suit (s. 153). An order of the commissioner is necessary to vest goods in reputed ownership in the assignees. A bankrupt is not to be liable upon any promise to pay a debt from which he has been discharged by his certificate (s. 204). Private arrangements between debtors and creditors may be carried out under the superintendence and control of the court (ss. 218—223). An insolvent trader may, under certain circumstances, wind-up his affairs without the stigma of bankruptcy. The court may grant either a first-class certificate, which declares the trader's inability to pay his debts to have arisen from misfortune only; or, a second class, in which it is declared to have arisen partly from misfortune; or a third class, in which it is declared not to have arisen from misfortune (s. 198 and sched. Z). The time for appearance of a debtor summoned before the court was reduced from fourteen days to seven (s. 80). Voluntary petitions are restricted, by requiring debtors applying for them to show that they are able to pay five shillings in the pound (s. 93). Judges' orders, as well as warrants of attorneys and cognovits, are to be filed. The assignees and creditors who have proved are to be deemed judgment creditors for the whole amount of proof and the separate proofs respectively; and the court, having refused further protection to the bankrupt, or having refused or suspended his certificate, may grant a certificate of such proofs, upon which a *ca. sa.* may be issued either by the assignees or any of such creditors, and the bankrupt, if arrested thereon, cannot be discharged under a year, except by order of the court (ss. 257—259).

IV. *Bankrupt—The three conditions required to constitute.*—To constitute a bankrupt three principal conditions are required—1, the party must be a trader within the meaning of the bankrupt laws; 2, he should have committed an act of bankruptcy not more than twelve months before the issuing of the fiat; 3, there must be (except where the trader makes himself a bankrupt), a creditor whose debt is, in nature and amount, sufficient to support the petition.

V. *Joint-stock company—Bankruptcy.*—The 7 & 8 Vic. c. 111, extended the remedies of creditors against the property of such joint-stock company, when unable to meet their pecuniary engagements, and provided for the winding-up of their concerns. By the first section, if any incorporated trading company, or

any other body of persons associated together for commercial purposes shall commit any act which by this act is to be deemed an act of bankruptcy on the part of any such company or body, a fiat in bankruptcy may issue against them by the name or style of the said company or body, upon the petition of any creditor or creditors of such company to such amount as is now by law requisite to support a fiat in bankruptcy, and be prosecuted in like manner as against other bankrupts. Proviso (s. 2) that the bankruptcy of such company or body in its corporate or associated capacity shall not be construed to be the bankruptcy of any of its members in its individual capacity (s. 7); upon a creditor filing an affidavit of debt in one of the superior courts, and issuing a writ of summons thereon, if the company do not within a month pay, secure, or compound to the satisfaction of the creditor, or satisfy a judge of their intention to defend on the merits, and enter an appearance to the action they shall be deemed to have committed an act of bankruptcy (sec. 11). The law and practice of bankruptcy is to extend as far as possible to fiats under this act (sec. 9); a member's share in the company is not to be set off against a demand which the assignees of the estate and effects of a company adjudged bankrupt may have against such member.

VI. *Trading—Acts constituting the same.*—Sec. 65 of 12 & 13 Vic. c. 106, contains a long enumeration of the dealings required to constitute a trading. It comprehends "all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who either for themselves, or as agents and factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, &c.; there is an express exemption of farmers and graziers in the interest of their landlords. In the interpretation of these words buying only or selling only will not qualify a man to be a bankrupt, but there must be both buying and selling, and getting a livelihood by it (*Ingliss v. Grant*, 5 T. R. 530), and also that only single act of buying and selling, unaccompanied by any intention of general dealing, will not suffice for the purpose (2 Bl. Com. 476). Buying or selling bank stock or other government securities on his own account will not make a man a bankrupt, they being not wares, goods or merchandise within the intent of the statute (*Colt v. Netterville*, 2 P. Wms. 308). Neither will buying and selling for particular purposes, as when a school-master buys books and sells them to his scholars (*Valentine v. Vaughan*, Peake, 76).

VII. *Acts of bankruptcy—Petition for an adjudication.*—The acts by which a man may become a bankrupt depend entirely upon the enumeration o

them contained in the statute book concerning bankrupts. The following acts, when committed by a person who trades within the meaning of the bankrupt laws, are acts of bankruptcy:—1. Departing this realm. 2. Being out of it and remaining abroad. 3. Absenting himself from his dwelling house. 4. Beginning to keep his house. 5. Suffering himself to be arrested or taken in execution for any debt not due. 6. Yielding himself to prison. 7. Suffering himself to be outlawed. 8. Procuring himself to be arrested or taken in execution. 9. Procuring his goods or chattels to be attached or taken in execution. 10. Fraudulent grant or conveyance of lands or chattels within this realm or elsewhere. 11. Fraudulent surrender of any of his copyhold lands or tenements. 12. Fraudulent gift or transfer of goods or chattels. But it is an essential ingredient in each of these acts that it should be done or suffered *with intent to defeat or delay his creditors* (12 & 13 Vic. c. 106, s. 67). With respect to conveyance or transfer, there is a proviso that no conveyance or assignment by deed of all the estate and effects of a trader shall be deemed an act of bankruptcy, if made *in trust for the benefit of all his creditors*, and if no petition for adjudication be filed within three months afterwards; but it must in that case be executed by each of the trustees within fifteen days after execution thereof by the trader; and the execution thereof by the traders and the trustees must be attested by an attorney or solicitor, and due notice thereof given in the *Gazette* and the newspapers (same s. 68). Further, if a trader, when arrested or imprisoned for debt, shall be in prison for twenty-one days and not discharged, or when arrested or detained for debt shall escape out of custody, he shall be deemed to have committed an act of bankruptcy. Also when, after the filing against him of any petition for adjudication of bankruptcy, he shall collude or make a private arrangement with the petitioning creditor, so as to give him a preference over the others; or where a trader in actual custody shall petition the Insolvent Debtors' Court for his discharge therefrom (same s. 74). Also, if he fail to appear to the summons of any creditor who will make affidavit of his debt in the court of bankruptcy, or refuse to make the admission, and yet decline to swear that he believes himself to have a good defence upon the merits. Also, if he does not pay or compound for a judgment debt within seven days after a notice in writing from the creditor, or seven days after notice of a peremptory order made in any court of equity, or in any matter of bankruptcy or lunacy, for payment of any sum, or if a petition filed for arrangement between himself and his creditors is dismissed.

VIII. *Petition of a creditor for adjudication in*

bankruptcy—Requisites.—The requisites to support the petition of a creditor for adjudication in bankruptcy are the following: 1, the debtor must be a trader within the meaning of the law; 2, he must have committed an act of bankruptcy in England or Wales (*Alexander v. Vaughan*, Cowp. 398) in the twelve months before the issuing of the fiat (12 & 13 Vic. c. 106, s. 88). The debt of the petitioning creditor must be of the amount required by the law (*Id.* s. 91), viz., for one petitioning creditor (or two or more being partners) £50 or upwards, or for any two creditors whose debts amount to £70 or upwards; or for any three or more whose debts amount to £100 or upwards. It is further requisite that the debt of the petitioning creditor should have been contracted in the course of trade, and that it should be a legal debt, contracted before the act of bankruptcy, though it may not have been yet due; equitable debts, though put on a level with legal debts, and paid *pari passu* after proof, cannot enable the claimant to become a petitioning creditor.

IX. *Petitioning creditor—Character of his debt.*—

1. The debt of the petitioning creditor must be a legal debt; equitable debts (though they may be proved for the purpose of a dividend) will not enable the claimant to be a petitioning creditor. 2. It must have been contracted (though it need not be payable) before the act of bankruptcy. But the fiat will not be invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt. Moreover, the debt must be of the requisite amount, and not have been contracted after the debtor ceased to be a trader (*Dawe v. Holdsworth*, Peake's N. P. C. 64).

X. *Petition for adjudication—Debt not due.*—The petitioning creditor's debt must have been contracted before the act of bankruptcy, but no adjudication is invalid by reason of any act or acts of bankruptcy prior to the debt or debts of the petitioning creditor or creditors, or any of them, provided there be a sufficient act of bankruptcy subsequent to such debt or debts (12 & 13 Vic. c. 11, s. 88). The object of this enactment is to prevent an adjudication regularly obtained being defeated by prior acts of bankruptcy. A debt payable at a certain future time, if contracted either in writing or verbally, upon a valuable consideration, will support an adjudication, though the act of bankruptcy be committed between the contract and day of payment (same s. 91; *Archb. Bankr.* 72).

XI. *Kind of debts which may be proved—General statement.*—When the accounts of the assignees have been audited, and a dividend declared, payment out of the effects is made by the assignees at so much in the pound to all creditors who have proved. The

following is a general statement of the debts which may be proved:—1. Legal and equitable debts arising out of judgments and recognizances, and other debts by specialty, and debts by mere simple contract. 2. Debts not payable at the time of the dividend made are to be proved and paid equally with the rest, deducting a rebate of interest (12 & 13 Vic., c. 106, s. 172). So claims upon insurances and bottomry may be proved after the contingency happens, although it does not happen until after the filing of the petition (*Id.* s. 174); and an annuity creditor is entitled to have the existing value of his annuity, and to prove for the amount ascertained by the court. Debts payable on a contingency after being valued by the court.

XII. Judgment creditors—Dividends.—In the distribution of dividends, judgments and recognizances not a year old (which, as debts of record, have at other times a priority) are put on a level with debts by mere simple contract, and are paid *pari passu*, after the landlord's year's rent, and the wages of the clerks, servants, labourers, and workmen of the bankrupt to the amount allowed by section 169. But judgments, if entered up a year before bankruptcy, are a charge on the lands of the debtor, and are therefore entitled to be paid whereout (12 & 13 Vic. c. 106, ss. 183, 184; 1 & 2 Vic. c. 110, s. 18; Key, div. "Bankruptcy," pp. 89, 90, 2nd edit.).

XIII. Joint creditor, separate estate.—A joint creditor is entitled to a dividend out of the separate estate only after the separate creditors have been fully paid; but if there be no joint estate at all, or any solvent partner (for the doctrine is said to be confined to the cases of partners in trade, Key, div. "Bankruptcy," p. 29, 2nd edit.), the joint creditors may prove against and receive dividends from the separate estate (Archb. Bank. 427, 8th edit.).

XIV. Legal and equitable mortgages.—Where a creditor has a legal mortgage with a power of sale, he may proceed to exercise that power, and the same is the case with an equitable mortgagee having such a power, but it is very rare that there is such a power in the case of an equitable mortgagee. If there be no such power leave of the court should first be obtained on a statement of the accounts between the parties, and indeed, it is usual to pursue this course though there be a power to sell (see Key, div. "Bankruptcy," pp. 101—104, 2nd edit.; Rules of 19 Oct. 1852, pl. 55).

XV. Distress when messenger in possession.—Though it is a general rule that goods in the custody of the law cannot be distrained, yet goods in the custody of the messenger may be distrained (for one year's rent), as the messenger is, for the purpose of possession, but the agent of the assignees in whom, by operation of law, the goods are deemed to

be vested. In fact, it seems that nothing short of removal of the goods off the premises will prevent the landlord from distraining (*Briggs v. Lowry*, 8 Meea. and W. 729; 20 Law Tim. Rep. 267; 1 Atk. R. 104; Key, div. "Bankruptcy," p. 90, 2nd edit.).

REPORT OF THE COUNTY COURTS COMMISSIONERS.

The commissioners appointed to inquire into the working of the county court and to point out any amendment which may have been suggested by experience, have made their first report. It is a clear and elaborate document, very instructive even as a sketch of the constitution, jurisdiction, and practice of the courts, but nevertheless too long to be allowed in our columns a place reserved for more practical matters. Nevertheless, as the alterations recommended by them are likely to be adopted, in future, we intend to give a summary of the recommendations or conclusions of the report so that our readers might judge of their value by comparing them with the observations of their own experience.

Legal Jurisdiction.

The report begins by comparing the procedure in the superior courts with that established in the county courts "In the former the means adopted for separating questions of law from those of fact, the exertions of skilled advocates accustomed to practise in the central tribunals of the country, the attendance of a learned and enlightened bar, in whose presence each judge is required to fulfil the functions of his office, the facility for reviewing his opinion and direction, and for appealing from the decision of the full court, are calculated to insure the satisfactory administration of justice. On the other hand, considerable delay and expense necessarily result from bringing the machinery of those courts into full activity.

"*County courts.*—In the county courts, the absence of any pre-appointed means of separating questions of law from those of fact, the non-employment generally of legal advocates, the non-attendance of a bar, the rapidity of the proceedings, and the power of the judge finally to decide on all questions of law and fact, except where the claim exceeds £20 in amount, render the judgment of the court less secure against miscarriage. On the other hand, the county court is near to the residence of the suitors, and the proceedings are simple, cheap, speedy, and final.

"*Claims of considerable amount best decided in superior courts.*—In claims of considerable amount, we are of opinion that the inconveniences incident to the administration of justice in the superior courts are counterbalanced by the greater certainty in the

application of the rules of law than can be expected in a tribunal so constituted as the county court.

"Small claims beneficially decided in county court."

—In claims of small amount we think that the evils caused by an occasional miscarriage are more than counterbalanced by the advantages presented by a local tribunal, the proceedings of which are simple, cheap, speedy, and final.

"Small" Claims defined.—It may perhaps be difficult satisfactorily to define the word "small," as it is a word of relation; but we think it may be conveniently treated, for the purposes of jurisdiction, as embracing claims not exceeding £20.

"In former class of claims, consent, express or implied, should be required to give jurisdiction to county court."—With regard to claims exceeding £20, but not exceeding £50 in amount, we think the jurisdiction should remain concurrent as at present, but that such claims should be subject to removal by the defendant on certain conditions hereafter specified; and we are of opinion that claims of a greater amount, or such as involve questions otherwise excluded from the jurisdiction, should be decided by the county courts only where consent has been given for that purpose by both parties, or a superior tribunal has directed the matter to be disposed of in the county court.

"Powers to be increased without organic change."—We think that the powers and procedure of the court should be increased and improved, without making any organic change in its constitution, so as to render it as efficient as the nature of the tribunal will permit.

"Division of subject."—We propose to divide our recommendations on the subject of jurisdiction into two parts—first, with reference to increasing the present jurisdiction of the courts; secondly, with reference to the introduction of additional securities for the due exercise of that jurisdiction.

"I.—WITH REFERENCE TO INCREASING THE PRESENT JURISDICTION OF THE COURTS."

"We will first consider the jurisdiction of the court, so far as it extends to claims not exceeding £5 in tort, and £20 in contract, and which may be treated, except in certain cases, as its exclusive jurisdiction. Secondly, the jurisdiction in tort, where the claim exceeds £5, but does not exceed £50, and in contract where it exceeds £20, but does not exceed £50, which is its principal jurisdiction concurrent with that of the superior courts. Thirdly, the jurisdiction in claims beyond that amount, and in certain otherwise excluded questions, which is the jurisdiction by consent.

"Exclusive Jurisdiction."

"County court originally intended to be a small

debts court—Experiment successful.—First, then, as to that which may be treated as the *exclusive* jurisdiction of the court, in consequence of the penalty by deprivation of costs in the superior court, should the plaintiff not recover a sum to the amount of £20 or £5, according to the nature of the claim. The object which the Legislature had in view when it established the county court evidently was, to secure to the public the benefit of a local tribunal, in which claims of a moderate amount, and not complicated in their nature, might be enforced with cheapness and rapidity. During the seven years which have elapsed since the establishment of the courts, the experiment has been eminently successful, and benefits have been conferred on the community by means of these courts which it is perhaps difficult to exaggerate. Honest claims have been enforced, and injuries have been redressed, which the expense, distance, and delay incident to the proceedings of the superior courts placed in effect beyond the power of the law. Facility to enforce rights has checked the commission of wrongs, and thus a more desirable state of credit and morality has been produced.

"Jurisdiction might be extended—Malicious Prosecution."—The consideration which we have bestowed upon the subject has not induced us to recommend any considerable extension of the jurisdiction of the court. We think, however, that as actions for false imprisonment are now within the jurisdiction, actions for malicious prosecution might be properly brought within it.

"Matters of title by consent, with certain Modifications."—We also recommend that the proviso contained in sec. 58 of the 9 & 10 Vic. c. 95, by which certain questions of title are excluded from the jurisdiction of the court, should continue in force, unless both parties should at the trial consent to the judge deciding the question in dispute. We think that such a jurisdiction might be beneficially conferred by the consent of both parties, where the question arises incidentally to the claim which it is the immediate object of the action to enforce. Thus, an action may be brought for the value of a tree which it is alleged that the defendant has wrongfully cut down. The defence may be, that the tree was growing on the defendant's own land. The question of title to the freehold then becomes a question incidentally arising in the cause, but which must be decided in order to dispose of the claim. Again: in an action for rent, if the tenancy under the plaintiff be denied, a question of title to the tenement may arise. Both parties may be quite willing that the judge of the county court should decide between them, but, as the law now stands, the judge has no power to do so, and consent would not confer jurisdiction for this purpose.

"We recommend, therefore, that if both parties are willing to have the case decided by the county court judge, an entry to that effect should be made on the minutes of the court, and then that the judgment should be binding on the parties, so far as the immediate question in dispute is concerned, but should not be evidence of title between the parties or persons claiming by, through, or under them in any other proceeding. The parties might thus have the benefit of a proceeding similar to that of a reference to an arbitrator, and obtain an immediate decision at a small expense, instead of being forced to proceed in a superior court, at an expense and with an amount of inconvenience far exceeding the value of the matter in dispute; and by the provision which we recommend on the subject of evidence, future rights or ulterior proceedings would not be compromised.

"It will be observed, that we do not recommend that jurisdiction should be conferred in such cases where the immediate object of the action is to recover something which the proviso enacts shall not be within the jurisdiction of the court; as, for instance, an action for tolls, or an action for the recovery of a tenement not within the meaning of sec. 122.

"*Costs on judgment by default in superior court not to be allowed.*—The present law as to costs in the superior court, so far as it affects jurisdiction, should, we think, remain unaltered, with the exception, that where an action is brought in the superior court on a contract to recover a less sum than £20, and the defendant suffers judgment by default, the plaintiff should recover no costs, unless, upon application, a judge of a superior court should otherwise direct.

"*Subject to exceptions.*—This deprivation of costs, however, we propose should be subject to the exceptions contained in sec. 128 of the 9 & 10 Vic. c. 95, where the parties reside more than twenty miles apart, or the other circumstances contemplated by the section exist.

"*Concurrent jurisdiction.*

"Secondly, we will consider the concurrent jurisdiction where the amount of the claim exceeds £5 in tort, and £20 in contract, but does not exceed £50. In those cases the choice of tribunal between the superior court and the county court is vested in the plaintiff. This jurisdiction as to claims above £20 was first conferred on the county court in the month of August, 1850, and has been exercised to a very considerable extent, as no less than 89,580 plaintiffs, both in tort and contract, ranging in amount between £20 and £50 inclusive, have been entered in the county courts between the time of passing the act and the 31st December, 1853; and of these 22,968 have been tried.

"It may be useful to state the number of such plaintiffs which have been entered and disposed of in each year respectively since the passing of the Extension Act, 13 & 14 Vic. c. 61.

"In 1850 there were 4297 plaintiffs entered, and 2436 causes tried; in 1851 there were 13,446 plaintiffs entered, and 8236 causes tried; in 1852 there were 12,567 plaintiffs entered, and 7020 causes tried; and in 1853 there were 9270 plaintiffs entered and 5276 causes tried.

"*Defendant's implied assent required to give jurisdiction in such cases.*—We are of opinion that in such cases the defendant should have an opportunity of expressing his dissent from the plaintiff's choice of tribunal. We see no objection to the plaintiff being permitted, as at present, to exercise his option in the first instance, for he must in all cases initiate the proceedings; but the defendant, if not disposed to try the cause before the county court, ought to be permitted to try in the superior court without assigning any reason, on giving satisfactory proof that his objection is not for the purpose of delay. For this purpose he should be required to give, in the county court, security for the amount claimed, and costs in the superior court, or to make a deposit to the like amount, not exceeding in the whole £150, the costs in the court below being treated as costs in the cause. The plaintiff might then be transmitted to such one of the superior courts as the plaintiff should direct. If, however, the defendant do not declare his dissent, and comply with the condition above mentioned, within such time as shall be fixed by the practice of the court, he must be taken to assent to the cause being tried by the county court, and that tribunal may then dispose of the cause in the usual way.

"This right of removal we intend to be in addition to the power to remove already existing by law in such cases.

"*Balance on allowance of set-off recoverable in county court.*—We are further of opinion, that if the sum claimed be a balance alleged to be due not exceeding £50, after making allowance for a set-off, if the claim and counter-claim do not respectively exceed £200, the case ought to be within the concurrent jurisdiction.

"*Where claim in superior court reduced to £50 by set-off, &c., case may be referred to county court.*—We also think that the concurrent jurisdiction may be rendered beneficially available by extending it to actions of malicious prosecution, and by enabling a judge, where, in an action brought in the superior court, it appears that a sum not exceeding £50 is claimed in an action of contract, or that the claim is reduced, by set-off, payment, or otherwise, to a sum not exceeding £50, to direct, on the application of

either party, and on such terms as he shall think fit, that the cause shall be heard in a county court.

"Questions of title decided by consent.—Our recommendations with reference to deciding questions of title by consent, where the amount in dispute does not exceed £20, extend to cases where the claim exceeds £20, and does not exceed £50.

"Jurisdiction by Consent.

"Thirdly, with reference to the jurisdiction by consent (see Rep. pp. 181, 238). This power was conferred on the court by the 17th section of the 13 & 14 Vic. c. 61.

"Parties to be permitted to refer any question within the jurisdiction of courts of common law, except actions for criminal conversation.—The principle of the section now under consideration is to permit parties, if so inclined, to refer to the county court judge as to an arbitrator; and we are of opinion that the principle should be applicable not merely to the matters enumerated in the above section, but should be extended to all questions, whether of law or fact, in which the courts of common law have jurisdiction, except claims for damages in respect of alleged criminal conversation. We think that claims of the latter description ought not to be made the subject of a proceeding by consent, as such a proceeding might be mischievously used, with the ulterior object of obtaining a divorce, in which the interests of the wife might in her absence be collusively sacrificed.

"Mode of consent to be retained.—We think, however, that the provisions of the statute as to the mode in which the consent of parties is required to be given should continue.

"Ejectment.

"We have already referred, in our statement of the jurisdiction, to the power with which the county court is invested in certain cases to restore possession of tenements where the annual rent or value does not exceed £50, and no fine has been paid.

"This jurisdiction to be extended.—This jurisdiction has been found beneficial to the public, and, subject to some modification, might be usefully extended. We think that the county court ought to have jurisdiction only in those cases where the amount of the annual rent and annual value does not exceed £50. Unless such an alteration in the law be made, the jurisdiction would continue to embrace a class of cases which the Legislature could not have intended to be decided in the county court. Thus, in the case of land let on a building lease, the reserved rent might not exceed £50, but the value of the houses erected upon it being of many thousand pounds' value, the annual value might far exceed £50. We therefore recommend that where the

annual value of the premises sought to be recovered exceeds the amount of £50, although the rent reserved does not exceed that amount, the case should not be within the jurisdiction of the county court. With this alteration of the law, we think that this jurisdiction might be usefully extended to cases where one half year's rent is in arrear, and the landlord or lessor has a right by law to re-enter for non-payment thereof, but no sufficient distress has been left on the premises to countervail such rent; and also to the case of mortgages where the money lent does not exceed £100, and the mortgagee is entitled to obtain possession. In the latter case we think that the judge should have power to postpone granting a warrant of possession for any period which the judge might think fit, and should be invested with the same powers as might be exercised by the court in pursuance of the first Common Law Procedure Act, sec. 219, in actions of ejectment between mortgagee and mortgagor.

"Notice of proceeding to be given by tenant to immediate landlord.—We think it also a desirable provision, that where a sub-tenant is served with a summons at the instance of the superior landlord, he should be bound to give notice to his immediate landlord, who should be entitled to come in and defend.

"Claim for mesne profits may be joined.—We also think that it would be convenient that a claim for mesne profits not exceeding £50 in amount should be allowed to be included in a plaint for the recovery of possession of the demised premises.

"Judge's decision subject to appeal, as in ordinary cases.—We are, however, of opinion that the finality of the judge's decision in cases of the above description should be modified, and that an appeal ought to be allowed where the annual rent and value of the premises or the mortgage debt exceeds £20.

"This mode of appeal to continue, besides cross action, as at present.—It appears to us that this mode of appeal should be allowed in addition to that provided by secs. 126 and 127 of the 9 & 10 Vic. c. 95, as stated Rep. p. 246.

"Replevin.

"The proceedings in replevin may, in our opinion, be materially improved by the introduction of certain alterations, which we shall proceed to state.

"Amendments suggested.—We recommend, first, that the clerk of the county court should be the sole replevin clerk in each district, and perform all the duties of that officer. Secondly, that the replevisor should be permitted, instead of giving security, to pay into the hands of the clerk a sum proportioned to the amount of the rent claimed or the damage alleged to have been done, such sum, in case of dis-

pute, to be settled by the clerk, together with a certain sum for costs. Thirdly, that a similar substitution of payment of money instead of giving security under the statute should be permitted when the plaint is removed. Fourthly, that the replevisor if desirous of trying the cause in the superior court should, on making a declaration similar to the statutory one, be permitted to give security, or pay money into the hands of the clerk; and that on such security being given or payment made, the chattel should be delivered to the replevisor, and the action of replevin be at once commenced in the superior court. Fifthly, that if the replevisor be desirous of proceeding in the county court, the practice as to removal now prevailing under the statute should continue, but modified by the right to deposit money instead of giving security. Sixthly, that where the cause is not removed by either party, the decision of the judge on questions of law should be subject to appeal, in the same manner as on ordinary claims in cases where the rent or damages exceed £20.

"In other respects practice to remain.—Except so far as the suggested alterations extend, we think that the present practice in replevin should continue unaltered.

"Interpleader.

"Jurisdiction by interpleader generally, vested in county court.—The county court has at present jurisdiction in cases of interpleader, arising out of claims made on chattels taken in execution, but has no jurisdiction in other cases, where interpleader is allowed in the superior courts. We are of opinion that such a jurisdiction should be conferred on the county court, and that wherever interpleader would be permitted in the superior courts of law, the suitors in the county court should be allowed a similar privilege.

"Decision of county court judge subject to appeal, even in case of goods taken in execution.—We think that in the cases last-mentioned, and in those where claims are made on goods taken in execution, the decision of the county court judge ought to be subject to appeal, in the same manner and on the same grounds as in ordinary claims exceeding £20.

"Where second action in superior court, jurisdiction of county court not to be ousted.—Where, in cases of interpleader, the second action is brought or threatened in the superior tribunal, we think that the right to interplead ought still to be reserved to the defendant in the county court. In the event of an issue being directed by the judge of the county court, he might select that tribunal to dispose of it which appeared to him most convenient for the purpose. Should a proper case be shewn for altering the tribunal before which the case was so directed

to be tried, a judge of the superior court might be enabled to interfere.

"Acknowledgments by Married Women.

"We think also that it would be desirable to enable the judges of the county courts to take the acknowledgments of married women, in pursuance of the 3 & 4 Will. 4, c. 74.

"II.—WITH REFERENCE TO ADDITIONAL SECURITIES FOR THE DUE EXERCISE OF THE JURISDICTION.

"We will consider, first, proceedings for the removal of causes; secondly, prohibitions; thirdly, appeals.

"Certiorari.

"May be granted in claims not exceeding £5, on special grounds.—As a general rule, the amount of the claim is a convenient test of the importance of the question to be determined, and therefore it is generally desirable that where a claim does not exceed £5, the cause should be irremovable. But it occasionally happens that questions of great difficulty, both of law and fact, arise in cases where the amount in dispute does not exceed £5.

"Security for, or deposit of, amount of claim and costs.—We recommend that where a claim, whether in tort or contract, does not exceed £5, it shall be competent for the defendant to remove the plaint into one of the superior courts, by leave of a judge of those courts, but only on giving security for the claim and costs in the superior court, not exceeding £100, or on depositing that amount, and on such other terms as the judge may think proper to impose.

"In larger claims.—As before observed, it is competent for a defendant to remove a plaint for a sum exceeding £5, and not exceeding £50, from the county court, by permission of a judge of the superior court, on such terms as he shall think fit.

"Security or deposit required.—We are of opinion that in such cases the law should remain unaltered, except that the judge should further be empowered to make the costs of the proceedings in the county court, which under the present law are lost to the party, costs in the cause.

"Proper checks on vexatious removals.—While, however, we recommend greater facilities than now by law exist for removing causes from the county court, we are anxious that such facility should not be used for the purpose of vexation or oppression.

"Applications for certiorari may at present be repeated.—By law, if one of the superior courts, or a judge thereof, refuse a writ of certiorari, it is competent for the applicant to renew his application in either of the other two courts, and in the event of a second refusal, he may apply to the third court. This state of the law appears to us inconvenient. We recommend that one application only should be made.

"Notice of obtaining writ to be given on pain of costs by order of county court judge.—We further recommend that in all cases where a certiorari has been obtained ex parte for the removal of a plaintiff from the county court, and the party obtaining it has not lodged the writ with the clerk of the county court two clear days at the least before the day fixed for hearing the plaintiff, and if he has not given notice to the plaintiff of such certiorari having been obtained one clear day at the least before the day fixed for hearing the plaintiff, the judge of the county court ought to be empowered, at his discretion, to order the party obtaining the certiorari to pay all costs of the day, or so much thereof as he shall think fit, if the court or judge granting the certiorari has made no order respecting such costs.

"Application in certain cases a stay of proceedings.—We think that a court or judge to whom an application is made for a certiorari to remove a plaintiff from a county court, or to whom application on affidavit is made for a rule or summons to shew cause why a certiorari should not issue, ought to be empowered in either case to grant a rule or summons to shew cause why a certiorari should not issue; and that such rule or summons, if so directed, should be a stay of proceedings until the determination of such rule or summons, or until the court or judge shall otherwise order; and that the party applying should serve a copy of such rule or summons upon the clerk of the county court; and if such copy be not served upon the clerk of the county court two clear days at the least before the day fixed for hearing the plaintiff, and if the rule or summons be not served on the plaintiff one clear day at the least before the day fixed for hearing the plaintiff, the judge of the county court should be empowered, at his discretion, to order the party applying to pay all the costs of the day, or so much thereof as he may think fit, unless the court or judge granting the rule or summons has made some order respecting such costs.

"Writs of Prohibition.—We recommend that restrictions similar to those which we think desirable in the case of writs of certiorari, except as to deposit of or security for costs, should, so far as they are applicable, be imposed on writs of prohibition.

"We further recommend, with regard to the writ of prohibition, that where it is directed to the judge of the county court, the decision of the superior court should be final, and that no declaration or further proceedings in prohibition be allowed.

Appeal.

"Decisions of judges of superior courts subject to appeal.—As a general rule, the decision of every judge of the superior courts is liable to be reviewed by some higher judicial authority. Upon the

beneficial influence of such a rule it is unnecessary to enlarge.

"In claims not exceeding £20.—In causes peculiarly within the jurisdiction of the county courts, however, one important object sought to be attained is finality, with which a right to appeal would injuriously interfere.

"No appeal should be allowed.—We think, therefore, that it would be contrary to sound principle to allow an appeal, either on questions of law or fact, when the matter in dispute does not exceed £20 in amount. If any difficult question of law be likely to arise in a cause of the amount we have mentioned, the facilities for removal already existing or which we have recommended would prevent a failure of justice; and with respect to unexpected difficulties arising at the trial, they must be exceptional, and should not interfere with the general principle of the jurisdiction.

"In other cases right of appeal should remain as at present.—With respect to claims which exceed the amount of £20, but do not exceed £50, and cases within the consent clause of the Extending Act, a right of appeal exists, and we are of opinion that no change should be made in the law in that respect.

"Similar power of appeal in other cases within the legal jurisdiction.—We also think that the power of appeal should exist in all cases exceeding £20 within the legal jurisdiction of the court, including that branch which has lately been conferred in matters of revenue.

"Secondly, as to appeals on questions of fact.

"With respect to those questions, we are of opinion that whether under the exclusive, concurrent, or consent jurisdiction, they ought not to be allowed.

"Mandamus.

"In cases where it is necessary to interfere by issuing a mandamus to a judge or any other officer of a county court, in order to compel him to perform some specific act, we think it desirable that the superior courts of common law should have power, instead of issuing a mandamus, to grant a rule for that purpose; and on the same principle that we have stated in proceedings by certiorari or prohibition, in order to prevent vexatious proceedings on the part of those who desire the interference of the superior court, the complainant should be limited to an application to one court for the purpose in question.

"JUDGES, OFFICERS, AND ADVOCATES.

"We shall now proceed to consider whether the present law, with reference to the judges, officers, and advocates of the court can be beneficially altered.

"Judge.

"Power of judge to change venue in certain cases.—At present the judge has no power to change the venue to an adjoining district, when on reasonable grounds it appears to him that the cause might be more conveniently or more fairly tried there. The want of this power has been productive of complaints. We think that it would be beneficial that the judge should have power to change the venue to an adjoining district, on the application of either party.

"We think, also, that when the judge is interested in the matter of the suit, it would be convenient to allow him to change the venue, in a similar manner, of his own accord, or at the instance of either party, or that the person having a claim on him should be enabled to sue in an adjoining district.

"Recommendations concerning the deputy judge.—In case of judge's death, deputy to continue to act until new appointment.

"In case of judge's death proceedings to continue from court to court.—It has also occurred, in consequence of the death of a judge, that considerable delay, expense, and confusion have resulted to the parties litigant, as in such cases the proceedings are not continued to a subsequent court.

"We recommend, therefore, that in such cases the proceedings should be continued to the next and any subsequent court, in the same manner as if they had been adjourned in the ordinary way, and that no additional fees should be paid in respect of such adjournment.

"The same where judge unavoidably absent.—Similar inconveniences result where a court is not held in consequence of the sudden illness of the judge, or of some accidental circumstance which prevents his attendance.

"To obviate the inconvenience thence resulting, we make a similar recommendation. In the latter case, however, we recommend that the clerk should be required to enter on the minutes of the next succeeding court the cause of the judge's non-attendance.

"Not more than 150 summonses ought to be made returnable on any one day.—We think it right to observe that our attention has been drawn to a prejudicial practice which exists in a few courts, of issuing a greater number of summonses returnable on one day than can be disposed of in a satisfactory manner in that period. In some instances more than 300 summonses have been made returnable on one day. This is obviously improper, and we are of opinion that the greatest number of summonses returnable on any one day ought not to exceed 150. We also think that it would be a great relief to suitors if no greater number than fifty summonses were made returnable at any one hour.

"Clerk.

"We recommend that in case of death or removal of a clerk, the deputy, or one of the assistant clerks, or a clerk temporarily appointed by a judge without the sanction of the Chancellor, should perform the duties of such deceased or removed clerk, until a successor is duly appointed.

"We are of opinion that arrangements should be made to secure to each court the exertions of a chief clerk.

"High Bailiff.

"Similar recommendations in the case of high bailiff.—Where the high bailiff dies or is removed, observations similar to those made in the case of the clerks are applicable.

"In such cases we recommend that the duties of high bailiff be discharged by the assistant bailiffs already appointed, or by persons to be appointed by the judge or by the clerk, until a successor be duly appointed.

"High bailiffs not to serve subpoenas.—With respect to one portion of the duties now discharged by the high bailiff, that of serving subpoenas, we think that he should be relieved from the performance of that duty, and that the parties requiring the attendance of witnesses should be permitted to subpoena them.

"Bailiff to act beyond limits of district in certain cases without leave of judge.—We think it desirable that the high bailiff of each district should be permitted, without leave of the judge, to serve or execute the process of the court either upon or against the person or the goods of the party liable, within 500 yards of the boundary of such district, but without being entitled to any additional fee in respect of the greater distance travelled for the purpose of such service or execution.

"We shall hereafter consider, in connexion with the question of fees, the mode in which the high bailiff should be remunerated.

"PROCEDURE.

"We shall now consider the procedure in the county court. It appears to us that some alterations are necessary in order to render its proceedings more efficient.

"Witnesses.

"Witnesses in custody to be brought up on judge's order.—We are of opinion that the judge of the county court should have power to issue an order commanding those who have the custody of prisoners required as witnesses, whether within his district or not, to bring them up before the court, on tender, to person having the proposed witness in custody, of a proper sum to defray the expences of the officer and prisoner going, remaining, and returning.

"Amendment.

"We think that the provisions of the Common Law Procedure Act, 1852, with respect to amendments, might with benefit be introduced into the county court.

"Judgment.

"*Effect of judgment exceeding £20 should on certain conditions be the same as that of judgment of like amount in superior courts.*—With relation to judgments for sums exceeding £20, we think, first, that the power of the judge to direct payment by instalments without the consent of the plaintiff should cease; secondly, that upon a judge of a superior court at Westminster being satisfied that the judgment debtor has no personalty which can be taken to satisfy the judgment, the judgment creditor should be permitted to sue out a writ of certiorari to remove such judgment into one of the superior courts, and such judgment, when so removed, should have the same effect, and the same proceedings might be had thereon as on a judgment of such court, except that no action of debt should be brought thereon without leave of the court, or a judge thereof.

"Warrant.

"*Execution or summons for commitment to issue any time within six years.*—By the present practice warrants of execution or summonses for commitment cannot issue where more than a year has elapsed since judgment was pronounced, without leave of the judge.

"By analogy to the altered practice of the superior courts, we think it desirable that in such cases, if the judgment be not more than six years old, the warrant or summons should issue without leave of the judge.

"*Warrants of execution or for commitment to be in force for a year.*—We recommend that the warrant should be in force for one year, but that at the expiration of every calendar month the bailiff should be required to enter in a book kept for that purpose whether the warrant had been executed, and if not, why not; and that this book should be always open to inspection without fee; and that in case of foreign executions, the bailiff of the foreign court should be required to make a similar entry.

"Executions.

"Questions have arisen as to the mode of determining the priority of executions when sued out of the county court.

"*Priority of executions from county court inter se.* We think that the priority of executions sued out of the county court should be determined by the time at which an application is made to the clerk to sue out execution, and that he should be required to enter in a book to be kept for that purpose the pre-

cise time at which such application was made. This provision is necessary, because the warrant is delivered to the bailiff by the clerk, and not by the party, as in the superior courts. The only effective step which a party can take for the purpose of suing out execution on his judgment is to direct the clerk to issue the warrant.

"*In conflict with executions from superior court.*—Doubts have frequently arisen as to which execution is entitled to priority, where executions have been issued against the same defendant from the superior court and the county court. No express provision has at present been made upon this subject, and it is important that the question of priority between these conflicting executions should be settled.

"*To depend on priority of instructions to clerk or delivery to sheriff.*—We think that the priority should be determined by the time of the delivery of the writ to the sheriff to be executed, or of the application to the clerk to issue a warrant to be executed, as the case may be."

(To be continued)

NOTES OF LEADING CASES.

Voluntary conveyances for benefit of creditors—Creation of trust—Grantee being a creditor—Revocation not allowed—Actual assent by grantee not necessary—Siggers v. Evans, 25 Law Tim. Rep. 213.—We have before (vol. 1, pp. 167—170, 304) considered at some length the doctrine of the revocability of a voluntary conveyance by a debtor for the benefit of his creditors where the deed has not been communicated to the creditors. We have now to call attention to a case establishing a most important distinction, and one which will go far to do away with the power of revocation (which, indeed, is a power very desirable to be abridged) where the grantee or assignee (as very frequently is the case) is a creditor of the grantor or assignor. In the above case of *Siggers v. Evans*, the Queen's Bench have decided that an assignment by a debtor to a creditor in trust for the payment of the latter and other creditors, after being communicated to the assignee, cannot be revoked by the assignor, and is not void as a voluntary conveyance, the rule on that subject being inapplicable to a case where the deed is made to one who has a *beneficial* interest, and not a mere power. Nor is any actual assent expressed by the assignee necessary, in order to vest the property in the grantee or assignee, so as to defeat an execution coming in after the assignment (see the cases, stated vol. 1, pp. 167, 170, of *Garrard v. Lauderdale*, 3 Sim. 7; 2 Russ. and Myl. 461; *Walwyn v. Coutts*, 3 Mer. 707; *Acton v. Woodgate*, 2 Myl. and Ke. 492; *Harland v. Binka*, 15 Qu. Ben. R. 713; *Smith*

v. Keating, 6 Com. Ben. Rep. 136 ; Smith v. Hurst, 10 Hare, 30). In delivering the judgment of the Court of Queen's Bench upon the point in the above case as to whether, under the circumstances, the deed remained a voluntary conveyance revocable by the assignor without any trust having been created, according to the doctrine of Garrard v. Lauderdale, in equity, and recognised at law in Smith v. Keating, Lord Campbell said :—

“The doctrine by which it is sought to avoid the deed is, that where a man makes a conveyance of his property to trustees in favour of his creditors of his own accord, without a previous bond, and without a communication to them, the deed is revocable and void as against the creditors as a voluntary conveyance ; and, therefore, although the trustees may assent to it, it has no operation to pass the property as against the execution until a trust has been created in favour of the creditor under the deed. The courts of equity have held, and the courts of law appear to have followed the holding, that the trustees in such cases are merely mandatories in whose hand the property has been placed for the purpose of distribution amongst the particular persons named in the deed ; and the well-known principle has been admitted, that the parties placing money in the hands of a third person for distribution amongst creditors or others have a right to countermand it and rescind the distribution of the fund, as between them alone, in the hands of the agent until some right has been created in the parties to be benefitted by the distribution. The authorities will be found clearly decisive as to the principles on which the rule was supposed to be founded, and as to the deed ceasing to be voluntary and revocable within the rule when the trust is created. But some difference of opinion appears to have existed as to whether an actual expression of assent to the deed on the part of some one or more of the creditors, is or is not necessary. The argument on the part of the defendant rested on the proposition that the deed remained revocable and voluntary until an actual assent to the deed on the part of some one or more of the creditors is given ; and it was contended that an implied assent would be insufficient. The authority relied on for this position, is the opinion said to have been expressed by Shadwell, V. C. in Garrard v. Lord Lauderdale, that a communication would not be sufficient without assent ; but this is merely a *dictum* of the learned judge, and was not necessary for the decision of the case, and it will be found that Sir John Leach, a Master of the Rolls, in Acton v. Woodgate, and Sir J. Wigram, V. C. in the case of Kirwan v. Daniel, appear to have entertained a contrary opinion. Wightman, J., in the last case in this court, of Harland v. Binks, founded his judg-

ment on its not being necessary that a creditor in such a case should have irrevocably bound himself to come in under the deed ; and he appears to have thought, in conformity with what was thrown out by Sir John Leach, that the communication of the trust by reason of which the creditor may not have pursued his remedy, or the position of the mandatory, was sufficient to make the deed no longer revocable. On these authorities we entertain great doubt whether the deed ought not to be considered as free from the objection of being revocable, as being known to the creditors to whom the trustees under the deed had given notice. But we do not consider it necessary, for the purpose of the present case, to decide whether there must be an actual assent, or whether the communication to the creditors is not sufficient, inasmuch as we think the doctrine that the deed, being considered as a mere power in the hands of the mandatory or agent, revocable until the deed is communicated by the agent, or assented to by the creditors, does not apply to a case where the deed is made to one who has a beneficial interest under it, and such a person cannot be considered as a mere mandatory within the rule as to revocation, as laid down by Lord Eldon, in Walwyn v. Coutts, and referred to by Shadwell, V. C., in Garrard v. Lord Lauderdale, as the foundation of his decision ; that rule is, that where a person does, without the privity, without receiving consideration, and without notice to any creditor, make a disposition as between himself and the trustees for the payment of debts, he has merely directed the mode in the deed in which his own property shall be applied for his own benefit and that of the general creditors, and the creditors named in the schedule are merely persons named there for the purpose of showing how the trust property under the deed shall be applied for the benefit of the volunteers. Sir John Leach speaks of the rule as showing that where a conveyance is not communicated to the creditors and they are not in any way privy to the conveyance, it has merely the same effect as if the debtor had delivered money to the agent to pay the creditors, in which case there might be part payment and communication without the agent of the creditors had recalled the money so paid ; and the judges of this court, in Harland v. Binks, treat the rule as depending upon the principle of the right of the assignor to revoke whilst the money is in the hands of the agent, according to the cases of Walwyn v. Coutts and Garrard v. Lord Lauderdale, and other cases of the same description. It is too late, now, to consider how far the principle of the right to revoke the authority of the agent was at all applicable to the case where the legal interest was intended to pass under the deed. In equity, where the real intention of the transaction is looked at, it has been

established that the object being that the party shall distribute as agent, the principal may revoke till the agent has bound himself to the creditors; and the courts of law have followed the decisions of the courts of equity in this respect. We do not think, however, we ought to extend this principle by applying it to a case where a party taking a legal interest under a deed has also a beneficial interest. In such case, it seems impossible to treat him as a mere mandatory; no assent of any third party as creditor to come in under the deed can be necessary to perfect his title, and he seems to have a right to claim directly under the deed as a party taking an equitable interest, and not as a mere mandatory who does not obey the directions, and who is subject to the revocation and the orders of his principal. It was said, indeed, that in *Acton v. Woodgate*, the trustees were creditors. That certainly was the fact, but in that case they did not choose to claim under the trust deed, but may be considered as renouncing any title under it, which they had a clear right to do, as those creditors who had been held not to be necessary parties had refused to come in under the deed. The point as to the trustees being creditors was not taken in that case, and there was enough to decide the case in favour of the trustees claiming under the second deed without reference to the question we are now considering. We think we cannot consider this deed, which is made to a creditor as trustee for himself and others, could be revoked by the assignor after it was communicated to the assignee, or that it was a void deed within the rule referred to.

Set-off (vol. 1, pp. 28, 302, xxxviii) *Personal representatives—Watts v. Rees—Mutual debts.*—We have already at some length noticed (vol. 1, pp. 23, 24) the state of the law as to the right of a defendant sued by an administrator, as such, to set-off a debt due from the intestate in his lifetime to him, and seen that in the case of *Watts v. Rees* (8 Exch. Rep. 696; Week Rep. 1853-4, p. 468; 18 Jur. 433; Law Journ. 1854, Ex. 238) the Court of Exchequer negatived this right. And we may also refer to the very instructive notice in vol. 1. pp. xxxviii and xxxix, of the discussion of this subject by the Birmingham Law Students' Society. We have now to add that on a writ of error, the Exchequer Chamber has affirmed the decision of the Court of Exchequer in the above case of *Rees v. Watts*, as reported in Week Rep. 1854-5, p. 575, so that it may be considered as settled law that to an action by an administrator for a debt due to him, as such administrator, the defendant cannot plead a set-off of money due to him from the intestate in his lifetime. Mr. Justice Coleridge in delivering the judgment of the court said that though the words of the 2 Geo. 2, c. 22, s. 13 (stated vol. 1, pp. 23,

xxxviii) are not so carefully selected as they might have been their meaning is clear; that in both the cases contemplated by the statute in order that a debt may be set-off it is necessary that it should have arisen between the same parties; that the debt in the above case did not originally arise between the plaintiff and the defendant, but between the defendant and the intestate. His Lordship after referring to the cases of *Schofield v. Corbett*, *Blakesley v. Smallwood*, and *Mardall v. Thelluson* (mentioned vol. 1, pp. 23, xxxix) approved of the former decision.

NOTICES OF NEW BOOKS.

SHELFORD'S SUCCESSION, &c., DUTIES.

The Law Relating to Probate, Legacy, and Succession Duties: Including all the Statutes and Decisions on those Subjects; with Forms and Practical Directions. By LEONARD SHELFORD, Esq., of the Middle Temple, Barrister-at-Law. London: Butterworths.

THIS is a work by a well-known and most indefatigable author, and though not confined to, has been called forth by the late Successions Duty Act. Mr. Shelford has, in fact, furnished a work which gives a complete view of the law relating to the subject by noticing the kindred subjects of probate and legacy duties, without a knowledge of which the Succession Duties Act cannot be understood. As Mr. Shelford observes in his preface, "The Succession Duty Act, 1853, having altered in some important particulars the legacy duty acts, and applied some of its provisions to the former act, it occurred to the author that a methodical arrangement of the several provisions of those acts would form an useful manual of reference for the use of the practitioner. Some forms framed with reference to the Succession Duty Act, 1853, which are not to be found in any other work on the subject, are added with the view of making the book more practically useful. The author having been unable to find in any book the present constitution and practice of the Queen's Remembrancer's Office has added a note on that subject, and regrets that he has had neither time nor opportunity to make this branch of the subject more complete."

We find it impossible to give such a description of the work as would afford an adequate idea of the labours of Mr. Shelford, but probably the following extract will show the reader that it is not a mere collection of acts of Parliament, particularly when we add that the greater part of the work is occupied with similarly well-digested information:—

"*Duties on monies arising from the sale of real estate.*—The legacy duty is expressly charged on monies to arise from the sale, mortgage, or other

disposition of real estate by any will or testamentary instrument *directed* to be sold, mortgaged, or otherwise disposed of (55 Geo. 3, c. 184, Sched. part iii; *ante*, p. 82). The question has occurred in several cases whether, taking the will altogether, there is a *direction* to the trustees to convert the estate into money, or whether it is really left in their discretion not to convert it into money. If the will amounts to a positive direction to sell, the legacy duty will attach, although in fact no sale has taken place (*Williamson v. Advocate-General*, 10 Cl. and Fin. 1). Thus, where real property was devised to trustees to be sold and the proceeds to be deemed part of the residue of the testator's estate or go in aid, if necessary, of the rest of his property in discharge of the pecuniary legacies given by his will, or any codicil thereto; the property was held to be liable to the legacy duty, although the residuary legatee took it in *statu quo*, and the trustees did not convert it into money by sale, according to the directions of the will, there having been no claim to render such sale necessary (*Attorney-General v. Holford*, 1 Price, 426).

"A testator devised real estates to trustees for the benefit of several parties for life, and after their deaths to be distributed amongst their children, &c., and a power was given, notwithstanding the trusts thereinbefore contained touching the freehold and copyhold estates, for the trustees for the time being to sell the same or any part thereof, as shall appear most expedient to the trustees for the time being towards effecting the arrangement of the testator's property and affairs. The money to arise by such sale was directed to be invested upon good or real securities at interest, or applied upon such trusts as were thereinbefore declared concerning the property so sold. On a question whether monies arising from part of the testator's estates which were sold because they were suitable for building, and of other parts which were sold under a decree in equity, were chargeable with legacy duty under 55 Geo. 3, c. 184, as real estate *directed* to be sold; it was held, that the sale under such circumstances was not a sale of property *directed* to be sold by the will of the testator within the meaning of the act, and therefore that the proceeds of the sale were not liable to the legacy duty (*In re Evans*, 2 Cr. Mees. & Rosc. 206).

"This case must now be considered as overruled as an authority for the general proposition that duty does not attach in any case where a sale is made under a *discretion* given to the trustees to sell and distribute the proceeds, but without any positive direction imposing upon them the obligation of selling. If the will permits the executors to sell real estate, and they sell it, the legacy duty is payable in the same way as it would have been if there

had been an express direction to sell the real estate (*Per Parke, B., Attorney-General v. Metcalfe*, 6 Exch. 43). A testator devised to trustees all his real and personal estate upon trust at such times as they might think expedient to sell, convey or otherwise convert into money the same or any part thereof, and after several specific bequests, directed all the residue to be invested as it should be realized, and be divided amongst his children in certain specified proportions. The trustees were to have the discretion of deferring any sale so long as they might think fit, and of causing any part or parts of the testator's real or personal estates to be valued instead of being sold, and of allotting such parts to any or either of the said testator's children, to the amount of the valuation, as a part of his or her proportion of the said testator's residuary estate, but to be considered as personal estate. The trustees in the exercise of this power having caused certain portions of the real estate to be valued and allotted to one of the testator's children; it was held, that no duty in respect thereof was payable, for taking the whole will together, a discretion in certain cases was given to the trustees to treat it as land, and the will not containing a positive direction to sell the land. But it was held, that as to such part of the real estate as had been sold under the will the legacy duty was payable (*Attorney-General v. Mangles*, 5 Mees. and W. 120; 3 Jur. 981).

"In an information for legacy duty a special verdict stated that the testator devised his real estates in trust to pay the rents to his brothers and sister, and the survivor of them for their lives, and after the death of the survivor to convey the estates to all his nephews and nieces equally, as nearly as they could make partition, and in the meantime to pay the rents to them. That for the purpose of such partition it should be lawful for the trustees to sell all or any part of the estates, and that they should stand possessed of the money arising from such sale upon the same trusts as were declared concerning the residue of the personal estate, namely, for his brothers and sisters and the survivor of them for life, and then for his nephews and nieces. The testator died in 1819, leaving his sister and two brothers him surviving, the last of whom died in 1832. He also left ten nephews and nieces. In 1833, and at various times afterwards, the trustees sold the real estates for £9,064, with the view of dividing the proceeds of the sale among the nephews and nieces. It was held, that legacy duty was payable on the above sum, it being within the meaning of the 55 Geo. 3, c. 184, sched., part 3, tit. Legacies, money arising from real estates directed to be sold (*Attorney-General v. Simcox*, 1 Exch. 749; 18 L. J., Exch. 61)."

THE BANKRUPTCY LAW.

(continued from vol. 1, p. 359).

OBTAINING ADJUDICATION.

We have stated (vol. 1, pp. 355, 356) that for a creditor to obtain an adjudication of bankruptcy against a trader there must be proof of—1, a petitioning creditor's debt; 2, a trading; 3, an act of bankruptcy. Of the two former some notice has been taken (vol. 1, p. 356—359). It now remains, therefore, to consider the proof of an act of bankruptcy committed by the trader.

Proof of the act of bankruptcy.—The act of bankruptcy is proved by a witness or witnesses, who attend before the commissioners and make depositions of the fact; and this personal attendance will not be dispensed with by the commissioners, without an order for that purpose, and it is extremely doubtful if the court would make such an order under any circumstances, if opposed.

It must be proved by the ordinary evidence that would be required of the same facts upon a trial at law. Therefore, where the act of bankruptcy consists of a conveyance of the party's property, the deed or other instrument must at least prior to the Common Law Procedure Act, 1854, s. 26 (see 1 Chron. pp. 158, 435), have been proved by the subscribing witness, if there were one, or by proof of the handwriting of the party, if there were not. But that statute seems to have done away with the necessity for calling the attesting witness, and though otherwise ruled at first it is now held, to apply to *ex parte* proceedings. Or if it consist of imprisonment, for instance, in the custody of the keeper of the Queen's prison, not only the commitment must be proved (and which may be proved from the prison books, or a certificate from the clerk of the papers, with a deposition of its being signed by him, which is the usual proof), but the committitur itself should be produced, to shew the cause of his commitment.

In all cases where the intent with which an act is done constitutes a part of the act of bankruptcy, the intent must be stated, either expressly in the deposition, or circumstances from which it may be fairly implied. And although the act of bankruptcy must appear to have been committed in England, or by remaining out of it, yet evidence of the intent may be derived from facts which occurred in a foreign country.

Forms of depositions as to acts of bankruptcy.—It will not be necessary to give forms suitable for every kind of act of bankruptcy, as the following will suffice to enable the practitioner to frame any deposition which may be required, attention being given

to what has been before stated as to each act of bankruptcy.

Begin to keep house [vol. 1, p. 191].—A. B., of &c., being sworn &c., upon his oath saith, that on the — day of — last past, the said C. D., at the dwelling-house and place of business of the said C. D., in — street aforesaid, gave orders unto this examinant, that if any of the creditors of him the said C. D. should come to his said house and inquire for him, this examinant should deny that the said C. D. was at home. And this examinant further saith, that after he had so received such orders as aforesaid, between the hours of — and — on the day aforesaid, one Mr. —, a creditor of the said C. D., came to the house aforesaid of the said C. D., and inquired of this examinant if the said C. D. was then at home, and told this examinant that he called for payment of an account then due and owing to him the said — from the said C. D.: and thereupon this examinant, in pursuance of the order he had so received from the said C. D., and knowing the said — to be a creditor of the said C. D., denied to the said — that the said C. D. was then at home; in consequence of which said denial the said — left the said house without seeing or speaking to the said C. D. And this examinant further saith, that at the time he so denied to the said — that the said C. D. was at home, as aforesaid, the said C. D. was at home and in the said house.

Departing the realm [vol. 1, p. 120].—That in the month of — last past, the said C. D. left England, with an intention of going to the kingdom of —, and that he is now residing at —, in the said kingdom of —, and has not since been within any part of the realm of England, as this examinant has been informed and verily believes. And this examinant further saith, that there are several creditors of the said C. D., who have not been able to recover or obtain payment of the debts respectively due to them by the said C. D., in consequence of his being out of the realm aforesaid; and this examinant verily believes that the said C. D. went abroad as aforesaid with the intent to delay or defeat his creditors, some or one of them, in the recovery of the debts due and owing from him to them respectively.

Departing from his dwelling-house [vol. 1, p. 191].—That in the month of — last past, the said C. D. departed from ["his dwelling-house" or "his lodgings in the house of one —"] in — street, in the said city of London, (the same being his usual place of habitation), and has not since returned to the same. And this examinant saith that he verily believes the said C. D. secretes himself from his creditors, for fear of being arrested by them, or some or one of them, for debt.

Procuring himself to be arrested [vol. 1. p. 192].—That the said C. D. did, on the — day of — last, procure himself to be arrested at the suit of one —, and that he was, at such suit, accordingly arrested; and this deponent further saith, that he verily believes that the said C. D. so procured himself to be arrested fraudulently, and with an intent to delay his creditors, some or one of them, in the recovery of the debts due and owing from him to them respectively, inasmuch [here state the circumstances from which it would appear he so procured himself to be arrested.]

Procuring his goods to be attached or sequestered [vol. 1, p. 192].—That the said C. D. did, on the — day of — last, procure his goods to be attached [or sequestered], by process issuing out of the Mayor's Court of the city of London, at the suit of one —, and this deponent further saith, that he verily believes that the said C. D. so procured his goods to be attached fraudulently, and with an intent to delay his creditors, some or one of them, in the recovery of their just debts, because, [here state the circumstances of collusion and fraudulent preference].

Procuring his goods to be taken in execution.—That the said C. D., on the — day of —, sent this deponent to inform one —, that his affairs were in an embarrassed state, and to offer to give him a cognovit to the amount of his debt, on which he could sign judgment and levy execution on his effects, to which offer the said — did assent, and a cognovit was accordingly given to the said —, by him the said C. D., and the said — did thereupon sign judgment and issue execution against the goods of the said C. D., and levied on the same; and this examinant saith, that he believes that such proceedings were had of the said C. D., without any previous application of the said —, and for the purpose of giving to him a fraudulent preference over the other creditors of the said C. D., he having previously told this examinant, that he was in considerable difficulties, and must soon stop payment, but that the said — had treated him, the said C. D., with great indulgence, and had therefore greater claims on him.

Fraudulent conveyance.—That on the — day of —, one thousand eight hundred and —, this examinant was present and did see the said C. D. duly sign, seal, and as his act and deed deliver, a certain indenture bearing date the day and year aforesaid, made between the said C. D. of the one part, and one —, of —, and —, of —, and the several creditors executing the said indenture, of the other part, whereby the said C. D., [here set out shortly the substance of the deed]. And this examinant saith, that the name of the said C. D. subscribed against the seal of the said indenture now

produced to him, this examinant, at the time of this his examination, and exhibited to —, Esquire, one of the commissioners of her Majesty's Court of Bankruptcy, is the proper handwriting of the said C. D., and [if the fact be so, though not now necessarily] that the name of this examinant subscribed to the said indenture, as a witness to the execution thereof, is of the proper handwriting of this examinant. [As to the necessity of this, see *supra* and 1 Chron., pp. 158—435].

Filing a petition to take the benefit of the Insolvent Debtors' Act.—A. B. of &c., maketh oath and saith, that he, this deponent, is (here state his office) of the Court for the relief of Insolvent Debtors, and that part of the duty of his office is to receive and file such petitions as are presented to that court by prisoners applying to be discharged from custody, and seeking relief under the several statutes for the relief of insolvent debtors; and this deponent saith, that the petition now produced by this deponent, and signed with the name of C. D., was received by this deponent, and was duly filed by him in this deponent's said office, on the — day of —, and that by an order of the said court, made upon the filing the said petition, the — day of — was appointed for the hearing of the matter of the said petition, and which order was duly inserted in the "London Gazette" according to the statute in that case made and provided.

The signature to the petition, and the imprisonment of the bankrupt at the time of his filing the petition, must be deposed to either in the same or another affidavit as follows:—A. B., of &c., maketh oath and saith, that he is well acquainted with the character and handwriting of the said C. D., having frequently seen him write, and that he verily believes that the name of C. D., set and subscribed to the petition now produced to this deponent, is of the proper handwriting of the said C. D.; and this deponent further saith, that the said C. D. was on the — day of — last (the time of filing the petition) a prisoner for debt in the — Prison.

The adjudication.—Not advertised until after notice. As already stated by sec. 101 of the Consolidation Act (set out vol. 1, p. 356), upon proof of the petitioning creditor's debt, and of the trading and act of bankruptcy of the person against whom the petition is presented, the commissioner is to adjudge such person bankrupt. An adjudication is accordingly made out and entered on the proceedings. Formerly this adjudication was forthwith advertised in the "London Gazette," but this is not so now.

Notice of adjudication.—When the adjudication is made the first step is to give notice to the bankrupt thereof, by serving a duplicate thereof on him personally, or by leaving the same at his last known

place of abode or place of business; this is to be done at or before the time of putting in execution a warrant of seizure. Not until seven days, or an extended period not exceeding in the whole fourteen days, which has been construed as meaning fourteen days beyond the seven mentioned in the statute (exp. Castelli, 1 De G. M. and Gord. 437; 21 Law Journ. Bank. 5), can the adjudication be advertised, unless the bankrupt before then surrender himself and give his written consent to such adjudication being advertised at an earlier period. The 104th section of the Consolidation Act is the one which relates to the above matter, and its provisions are as follows:—

Section 104 — Bankrupts to have notice before advertisement of adjudication, and to be allowed seven days, or such extended time, not exceeding fourteen days, as the court shall think fit, to show cause against adjudication—adjudication may, with bankrupt's consent, be advertised before the expiration of the time allowed for shewing cause.—"That before notice of any adjudication of bankruptcy shall be given in the "London Gazette," and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person; and such person shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the court shall think fit, from the service of such duplicate, to shew cause to the court against the validity of such adjudication; and if such person shall within such time show to the satisfaction of the court that the petitioning creditor's debt, trading, and act of bankruptcy upon which such adjudication has been grounded, on any or either of such matters, are insufficient to support such adjudication, and upon such shewing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication, in lieu of the petitioning creditor's debt, trading, and act of bankruptcy or any or either of such matters, which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of the court, the court shall thereupon order (in the form contained in schedule U. to this act annexed or to the like effect), such adjudication to be annulled, and the same shall by such order be annulled accordingly; but if at the expiration of the said time no cause shall have been shewn to the satisfaction of the court for the annulling of such adjudication, the court shall, forthwith after the expiration of such time, cause notice of such adjudication to be given in the "London Gazette," and shall thereby appoint two public

sittings of the court for the bankrupt to surrender and conform, the last of which sittings shall be on a day not less than thirty days and not exceeding sixty days from such advertisement, and shall be the day limited for such surrender; provided always, that the court shall have power from time to time to enlarge the time for the bankrupt surrendering himself for such time as the court shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself; provided also, that if any person so adjudged bankrupt shall, before the expiration of the time allowed for shewing cause, surrender himself, and give his consent, testified in writing under his hand, to such adjudication being advertised, the court, after such consent so given, shall forthwith cause the notice of adjudication to be advertised, and appoint the sittings for the bankrupt to surrender and conform.

Annulling before and after advertisement.—It will be necessary to bear in mind that there may be an annulment under the above section *before* the advertising of the adjudication, and another, under sec. 233, *after* the adjudication is advertised: the time mentioned in the above statute has, it must be remembered, been enlarged where the bankrupt is within the jurisdiction (see *supra*, and vol. 1, p. 153). This distinction was settled by the case of *re Carter* or *Carter v. Dimmock* (1 De G. M. and Gord. 212; 21 Law Journ. Bank. 23; 4 Ho. Lords Cas. 337; 17 Jur. 515; 15 Jur. 1142; 22 Law Journ. Bank. 55), in which case V. C. Knight Bruce's decision was over-ruled by Lord Truro, and the decision of the latter was upheld in the Lords, it being finally held that a commissioner has no jurisdiction to annul his adjudication of bankruptcy, on the application of the bankrupt, except where the bankrupt shows cause under the above 104th section. After the advertisement of the adjudication the bankrupt must appeal to the Lords Justices. As this is a matter of importance, we insert a portion of Lord Truro's judgment, it being borne in mind that since this decision the jurisdiction of the Vice-Chancellors has been transferred to the Lords Justices (vol. 1, pp. 6, 81). His Lordship said:—"In the 104th section, is the first opportunity for the trader to resist the proceedings in bankruptcy before the advertisement. Suppose he does not do so, what is the next step the act has provided by which to limit the period within which the fact of bankruptcy shall continue to be doubtful as regards the bankrupt himself? The 233rd section provides, that unless the bankrupt shall (being within the United Kingdom at the date of the adjudication), within twenty-one days [now, two calendar months] after the advertisement of the bankruptcy, "have commenced an action, suit, or other proceeding to dispute or annul

the *fact*, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect." the Gazette shall be conclusive evidence of the bankruptcy.—Now, these being the general provisions of the present statute, what has the bankrupt in the present case done? He did not contest the commissioner's adjudication within the time limited by the 104th section; but some time afterwards (within the twenty-one days after the advertisement) he presented a petition to the commissioner, in which he prays that the said petition for adjudication of bankruptcy, or the said adjudication thereunder, may be annulled. It is said that the commissioner possesses original jurisdiction to adjudicate on the fact of bankruptcy, and it is contended for the petitioning creditor, that when he has done so, and the time for shewing cause against the adjudication has expired, there is an end to his jurisdiction, and that the only mode of impeaching that decision is by way of appeal; and that, wherever an appeal is given, you must resort to the act of Parliament to see what is the appellate jurisdiction; that there is nothing in this act to point to a second hearing by the commissioner, but that it is well known that the decision of the commissioner is open to an appeal to the Vice-Chancellor. The question therefore is, what is the true character of the petition which was presented on the 19th March? Was it an original proceeding on the part of the bankrupt to annul the adjudication? The petitioning creditor says it had not that character, for that if it was finding fault with the judgment of a competent tribunal, it was in its nature an appeal; and that the nature of the transaction cannot be altered by changing its name; and that this is an attempt to have a review of the commissioner's adjudication after the expiration of the time limited by the 104th section, and even up to the twenty-one days after the commissioner's rejection of his petition, by calling it a petition of appeal from an original proceeding to annul. That the bankrupt was entitled to take the opinion of the commissioner on the facts which he might produce, as a reason for annulling the adjudication, is perfectly clear; but is not this also equally clear, that where the bankrupt wishes to avoid an appeal, by shewing cause before the commissioner against the adjudication, that proceeding should be within seven days, or the extended time limited by the 104th section? I think the Legislature has clearly expressed that; and that what he wants to do is what the Legislature has said that he should do, if at all, within that time. I think that the petition of the 19th March was, to every intent and purpose, a petition of appeal; and it appears to me that that petition was not presented to the proper tribunal, and that it was not competent to the com-

missioner to review his own decision after the time limited by the 104th section. The petition was certainly presented before the expiration of the twenty-one days after the advertisement, but that was a petition, as I have before stated, calling upon the commissioner to review his own decision. If that was a right proceeding, then the petition of appeal from the order dismissing that petition was also within the twenty-one days allowed by the 12th section; but if it was not a right proceeding, then there has been no proceeding taken within the twenty-one days after the advertisement, according to the 233rd section. The whole question, therefore, turns upon whether the petition, which was presented on the 19th March, was or was not a valid proceeding to dispute or annul the adjudication of bankruptcy. If the judgment of the commissioner was correct in holding that he had not then jurisdiction to annul the adjudication, then that petition, which was directed to complain of the adjudication, cannot be sustained. I am of opinion that the commissioner was right, and that the act of Parliament would be evaded by the extension of the power beyond what the Legislature intended, supposing the present order to stand. I think that it was not competent for the commissioner to annul the adjudication upon that petition; and therefore the appeal against the order made by the commissioner cannot be sustained, and the present order appealed from, which declared that it was competent to the commissioner to annul, must be reversed."

It should be stated that Mr. Commissioner Stephen (re Seckhampton, 18 Law Tim. Rep. 9) decided that the commissioner has jurisdiction to entertain a petition for annulment of an adjudication. And see also *exp. Emery* (23 Law Journ. Bank. 33), where, it appeared, that a party was adjudicated bankrupt, and the assignees sold chattels (alleged to have been mortgaged to A. B.), as being in the order and disposition of the bankrupt. The time had expired within which, by the 233rd section of the Consolidated Act, the bankrupt could have petitioned to annul. But A. B. presented such petition, and the commissioners, on the ground of want of trading, annulled the adjudication. Held upon appeal of the petitioning creditor that, as upon the evidence, it appeared that the application to annul was made at the instigation of the bankrupt, the adjudication must be restored, the court declining to decide the question of trading. But these decisions must be considered as being overruled as to the petitioning after the advertising, although, as to the last, it may be observed that a petition to annul may be presented by a creditor to the commissioner, and he may appeal therefrom within twenty-one days [now two months], although much more time may have elapsed since

the adjudication (exp. Bean, 1 De G. M. and Gord, 486).

Extending time.—As we have seen it is provided by section 104, that, if for any cause the commissioner thinks fit to extend the time for showing cause against an adjudication in bankruptcy, he may do so, provided the further time does not exceed fourteen days. These fourteen days are exclusive of the seven days mentioned in the act. If the consideration of the matter is commenced within the fourteen days, the act does not preclude the commissioner from adjudicating on it whenever it may be necessary to do so. Four partners were adjudicated bankrupts. Two resided abroad. The adjudication was made on the 8th of November. On the 18th, notice was given of an application on behalf of the partners abroad to suspend the advertisement. On the 17th, the meeting was held to shew cause against the issue of the advertisement, and the application was then made. It was held upon appeal, that having been given within the seven days, everything was *in fieri*, and the commissioner had authority to grant the application. (Re Castelli, 21 Law Journ. Bank. 5; 1 De Gex, Macnagh. & Gord. 437).

Notice to dispute adjudication.—As we have seen the statute allows the person adjudged bankrupt a certain time "To show cause to the court [commissioner] against the validity of the adjudication, and if such person shall within such time show to the satisfaction of the court that the petitioning creditor's debt, trading, and act of bankruptcy, are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication in lieu of the petitioning creditor's debt, trading, and act of bankruptcy, or any or either of such matters, which shall be deemed insufficient in that behalf, shall be proved to the satisfaction of the court," the court [commissioner] is to order such adjudication to be annulled. In order that the petitioning creditor may know what is disputed, it is provided by rule 14, that "if any person adjudged bankrupt intend to show cause against the validity of such adjudication, he shall cause notice in writing of such his intention to be served upon the petitioning creditor, or his solicitor, and upon the registrar, two clear days at least before the day appointed by the court for showing cause against such adjudication, and in such notice shall state which of the following matters—namely, the petitioning creditor's debt or debts, the trading, or act or acts of bankruptcy, he intends to dispute."

Names of witnesses and copies of depositions to be given to bankrupt.—With a view to enable the bankrupt to ascertain the nature of the case made against

him, it is, by rule 15, provided that, "after serving such notice of his intention, he shall on application be forthwith furnished with the names of the witness or witnesses deposing to the matter in dispute, and shall, on payment for the same, have a copy of the deposition or depositions, or any of them, as the court in its discretion may think fit." It seems that, except within the time limited by the 104th section, the bankrupt would not be entitled to be furnished with copies of the depositions (see re Clendenning, 18 Law Tim. Rep. 160).

Proof in support of adjudication on showing cause Further time granted.—By rule 16 it is provided that, "on the appearance to show cause against the validity of the adjudication, the petitioning creditor's debt, trading, and act of bankruptcy, or such of those matters as the person adjudged bankrupt shall have given notice that he intends to dispute, shall again be proved *viva voce*, unless otherwise directed by the court, and if any new evidence of those matters, or any of them, shall be given, or any witness or witnesses to such matter shall not be present for cross-examination, and further time shall be desired to show cause, the court shall, if it think the application reasonable, grant such further time as it may think fit." No proof will therefore be necessary of any matters, notice to dispute which has not been given. The practice is, that the petitioning creditor must begin and establish the requisites disputed before calling on the bankrupt to show cause (re Clay, 1 Fonbl. 212).

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ACQUIESCENCE.—"Standing by"—*Permitting party to build on land during treaty for sale.*—In the following case the Lord Chancellor observed that he never liked the expression "standing by," because it was calculated to mislead as to what was the law. Standing by is important only so far as it is an act of encouragement to go on and do what the party is doing, or as an inducement to him to alter his position. "There is," added his lordship, "perfect good sense in what was said by Lord Hardwicke in *Vincent v. East India Co.* (2 Atk. 83), and which I have always understood to be a cardinal rule upon the subject, that if a man comes to treat with me for the purchase of a piece of my land, in order to build a house upon it, and we cannot come to terms, he shall not, because he chooses to go and build afterwards, come to me and say, you have acquiesced in that, and I insist upon having the value of the land as it was before I built; in other words, if there be a treaty about land, and disagreement as to terms, and the intending purchaser nevertheless expends money

upon it, the vendor shall not be taken to have acquiesced." *Meynell v. Surtees*, Week Rep. 1854-5, p. 535; 25 Law Tim. Rep. 227.

ASSETS.—*Estates devised subject to a general charge of debts*—*Estates descended first liable.*—In the administration of assets in equity, it is a rule that descended estates must be applied before devised estates; in other words, as a court of equity always applies assets not specifically given to any one before assets that are specifically given, a devised estate cannot be resorted to till all the descended estates are exhausted (1 Atk. Conv. 342, 1st edit.; *Williams v. Chitty*, 3 Ves. 545). The following case contains an application of the above rule under the circumstances of estates descended to the heir, and of a gift of a life estate, charged with debts, and of the remainder to three persons, one of whose interests lapsed by her death in the lifetime of the testator, and consequently passed to the heir-at-law of the testator. Was this lapsed third liable rateably with the other descended estates? The precise circumstances were these:—T. P., in 1832, devised and bequeathed all his real and personal estates to the use of his mother, A. P., for life (subject to the payment of debts, &c.), and after her decease he gave and bequeathed the farming stock, &c., upon the farm at F. unto his sister S.; and as to all his real estate, and the residue of his personal estate, the testator devised and bequeathed the same to the use of his three sisters, E., J., and M., equally, absolutely. E. died unmarried in the lifetime of the testator. The debts of the testator, who died in November, 1838, greatly exceeded his personal estate. After the date of the will the testator purchased other real estate, which he had not devised: Held, that the estates which had descended in consequence of their being purchased after the making of the will must first be applied in payment of the debts charged upon the estate devised to A. P. for life; that if such descended estates were not sufficient to discharge the debts, then a sufficient part of the devised estate must be applied for that purpose, and that the lapsed remainder in one-third of the estate devised was liable to the charge of debts, on the same footing as the other two-thirds of the same estate, but not in priority to them, as the whole fee simple being subject to the charge of debts, the share of the heir who took the lapsed remainder was, as to the liability to the charge of debts, on the same footing as the shares of the two other devisees in remainder. *Wood v. Ordish*, 1 Jur. N. S. 584.

COPYHOLDS.—*Fine on admission—Who to pay on agreement to surrender, and pay costs and charges thereof.*—Difficulties are continually arising in conveyancing practice respecting the payment of the fines on admission to copyholds from parties not ap-

pearing to understand the effect of an agreement to surrender copyholds and pay the costs and charges thereof. Will this include the payment of the lord's fine on admission? In *Graham v. Sims* (1 East, 632) it was decided that a covenant by a vendor to surrender copyholds at his own costs and charges was not broken by non-payment of the fine, the reason being that the title is perfected by the admittance, and the fine does not become due until after the admission. As Mr. Watkins (1 Copyh. 347, 4th edit.) observes, "No fine can be due until the tenant be actually admitted, and of consequence the lord or steward cannot refuse admission till the fine be paid." And in accordance with this rule, on a sale of copyholds the purchaser pays the fine on admission, and even an agreement to surrender and assure the estate at the vendor's costs and charges will not render him liable to the fine payable on admittance (*Drury v. Man*, 1 Atk. 95, note; *Graham v. Syme*, 1 East. 632; 17 Jur. 1064; *Dart's Vend.* 373, 2nd edit.). The above will explain the following decision:—Covenant by A. B., a husband, with trustees that he will at his proper costs and charges surrender to the lord of the manor, according to the custom, the copyhold hereditaments to which his wife was entitled to the use of the trustees, to the intent that they might, at the costs and charges of A. B., be admitted tenants upon trust, to pay the rents to the wife for separate use: Held, that the act of admittance was complete before the fine became payable, and that A. B. was not bound to provide for the fine under the words "costs and charges." *Barrow v. Barrow*, Week Rep. 1854-5, p. 587.

DOWER.—3 § 4 Will. 4, c. 105—*Old Dower uses and expressing intent to bar future wife.*—By sec. 2, Dower Act, a widow is entitled to dower where her husband was beneficially entitled to an estate equal to an estate of inheritance in possession. Sec. 6 declares that she shall not be entitled to dower out of any estate when in the deed by which it is conveyed it shall be declared that she shall not be entitled to dower. By sec. 14, the act is not to give to any deed executed before 1834 the effect of defeating any right of dower. This last section has been decided to have the effect of preventing the operation of sec. 6, so far as regards any deed executed before 1834. It has therefore been decided that, a widow married after 1st January, 1834, is entitled to dower out of an estate conveyed to her husband (then married to a former wife) before 1834 to the old uses to bar dower containing the words—"To the intent that my present or any future wife may not be entitled to dower." Costs will be given to the plaintiff in a suit for dower where the right is unsuccessfully resisted. *Try v. Noble*, Week Rep. 1854-5, p. 599.

FEME COVERT.—*Equity to a settlement—Bankruptcy* [vol 1, pp. 9, 87, 200, 272, 372, 459].—Out of £5,000, the property of a married woman, £2,500 clear of all costs and expenses, was directed to be settled upon her against the assignees of the husband, who was an uncertificated bankrupt in prison, and totally unable to provide for the support of his wife and children. *Lea v. Church*, Weep. Rep. 1854-5, p. 603.

FEME COVERT.—*Fines and Recoveries Act* (3 & 4 Will. 4, c. 74)—*Estate tail—Married woman—Disentailing deed—Acknowledgment* [vol. 1, pp. 150, 264, 447]—*Enrolment.*—By the 3 & 4 Will. 4, c. 74, s. 40, every disposition of lands under that act by a tenant in tail thereof is to be effected by deed—i. e., "made or evidenced by deed;" by sec. 41, no "assurance" by a tenant in tail is to have any operation under the act unless enrolled within six calendar months; sec. 77, authorising alienation by married women, requires the deed to be acknowledged by her; and by sec. 79, every deed executed by a married woman for the purposes of the act (except as protector) is, upon her executing the same, or afterwards, to be produced and acknowledged by her as her act and deed before a judge, &c. It has been decided by the Master of the Rolls that the acknowledgment of the execution of a disentailing deed by a married woman under the above act may be taken subsequently to the enrolment of the deed, and after the expiration of the six months limited for enrolment. *Re the London Dock Company's Act*, 25 Law Tim. Rep. p. 241.

MORTGAGE.—*Proviso for reduction of mortgage interest.*—Where there is a proviso that, in case of punctual payment the interest on a mortgage shall be at a reduced rate, such punctual payment being made on any of the half-yearly days specified in the deed for the payment of the interest, the condition, although broken by non-payment, revives, and the lower rate of interest can be still paid if coming within the time fixed for the proviso. A mortgage deed after reserving £5 per cent. interest, contained the following proviso:—"Provided also that, if on the 16th day of July, 1840, and on the 16th day of January, 1841, and the 16th day of July and the 16th day of January in every year afterwards, or within one calendar month after each of the said days respectively, half a year's interest after the rate of £4 10s. for every £100 by the year, for the sum of £20,000, or for so much thereof as should for the time being remain due, should be paid to the trustees of the said insurance company; then for every half year for which interest after the rate of £4 10s. for every £100 by the year, should be so paid as aforesaid, the said trustees should accept and take such interest in lieu and satisfaction of in-

terest after the rate of £5 for every £100 by the year." Default was made in payment of interest for four years, but the rent more than covered the interest, and the master having disallowed a claim of £5 per cent. for interest made by the mortgagees since taking possession; the V. C. supported the disallowance, on the ground that the condition applied to each successive half year; and that what the parties intended, was, that if in any given half year the interest was punctually paid, it should be accepted at £4 10s. per cent.; but if payment was not punctually made, then that £5 per cent. should be taken for that half year. *Wayne v. Lewis*, Week. Rep. 1854-5, p. 600.

MORTGAGE.—*For present and future advances—Future advances, with notice of, not available against subsequent incumbrancer without notice.*—The following doctrine as to the non-effect of future advances as against a party taking without notice of the security providing for future advances, is one of extreme importance, and certainly is not one generally understood. Indeed, as observed by the Master of the Rolls in his judgment in the case presently noticed, the law with respect to the question whether a second incumbrancer who takes subject to a prior mortgage expressed to secure a sum then due, and also future advances, is entitled to priority over the advances made subsequently to his security, by the first incumbrancer having notice of such second incumbrance, is a point not free from doubt on the authorities. The ground on which it is put in favour of the first mortgagee, who claims priority for his subsequent advances, is, that the second mortgagee might, by tender of the amount due to the first mortgagee, have stopped all future advances, and the case of *Gordon v. Graham* (7 Vin. 52, pl. 3) is cited, where Lord Cowper held, that the second incumbrancer, when he advanced his money, having notice of the nature of the first mortgage, could not redeem the first mortgage without payment of the sums advanced by the first mortgagee after he had received notice of the second incumbrance. This decision has not met with the unanimous approbation of the profession. Mr. Powell, in his "Treatise on Mortgages," doubts the soundness of the decision; and Lord St. Leonards, in *Blunden v. Desart* (2 Dru. and W. 405), says: "Even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves further consideration whether it would be safer to rely in all cases on *Gordon v. Graham* as an authority that the advances may be safely made after the first mortgagee has notice of a second mortgage. This case has never, it is believed, been considered as an authority for holding that the doctrine applied to the case of a second incumbrancer, who advanced his

money without notice of the first mortgage. Lord Cowper certainly relies upon the fact of notice, for he observes: "It was the folly of the second mortgagee, with notice of the nature of the first incumbrance, to take such security." The Master of the Rolls observed in the following case that this reasoning obviously fails to apply to the case of a second incumbrancer, who not only had no notice of the prior incumbrance, but who obtains his charge on the estate not by reason of any contract with the owner, but by operation of law, which gives to the registered order to pay the effect of an incumbrance on the land for a debt which the debtor had refused or was unable to pay to the creditor. In accordance with this his Lordship decided the following case:—Mortgage to A. to secure present and future advances, with subsequent registered judgment in favour of B., without notice of the mortgage: Held, that B. had priority over A. in respect of subsequent advances made with notice of the judgment. *Shaw v. Neale*, 1 Jur. N. S. 666; 24 Law Tim. Rep. 112.

SALE.—*Contract by offer and acceptance—Bankruptcy—Land not bound by unaccepted offer.*—An offer to sell may be revoked, and a revocation will be implied unless accepted promptly, or within a reasonable time. The offer falls to the ground on the bankruptcy of the party making it, as it cannot, like a concluded agreement be said to run with the land. An unaccepted offer transferred does not bind the land. *Meynell v. Surtees*, Week. Rep. 1854-5, p. 535; 25 Law Tim. Rep. 227.

SOLICITOR.—*Gift from client—Fictitious consideration.*—It is a rule in courts of equity that a solicitor can purchase his client's property even while the relation subsists between them; but in consequence of the jealousy with which such transactions are viewed by the court, the onus is thrown upon the solicitor to show that every thing was perfectly fair; that the vendor knew what he was doing; that the full price was given, and, of course, that no advantage was taken of the character of solicitor. This rule is far more stringent with regard to gifts. The distinction is established by *Turner, L. J.*, in *Holman v. Loynes*, 18 Jur. 839, 842, who says that the rule against gifts is absolute, but against purchases not absolute, which clearly means that as to purchases they may be void, but as to gifts they are absolutely void, if made while the relation exist, and if the client or those claiming under him choose to impeach the transaction. These principles were applied to the following case: A solicitor had prepared, and the client executed, a deed, wherein it was witnessed that in consideration of £100 the client conveyed certain lands to the solicitor. The closes were worth £2,000, and the

£100 was never paid, nor was any other consideration. The solicitor maintained that the consideration expressed was a fiction for the purpose of saving the stamp duty: Held, that it is not competent for an attorney to alter the effect of an instrument by reciting this consideration upon its face—that as a purchase for £100 it could not stand, as in all such cases the price must be the full value—that therefore the solicitor must be declared a trustee of the lands for the devisees of the client. *Tomson v. Judge*, 1 Jur. N. S. 588.

SOLICITOR.—*Lien of—Bound to produce deeds as evidence between third parties.*—The dictum of V. C. Wigram in *Griffiths v. Ricketts* (7 Hare, 299, 304), that a lien was in substance the same as a mortgage, was dissented from by L. J. Turner. In accordance with the cases of *Brassington v. Brassington* (1 Sim. and Stu. 455), and *Bradshaw v. Bradshaw* (1 Russ. and Myl. 353), it has been decided that a lien of a solicitor upon a deed belonging to his client does not entitle him to refuse to produce the deed as evidence between third parties, but, possibly, the solicitor may require the presence of the persons to whom, subject to the lien, the deed belonged. *Hope v. Liddell*, 25 Law Tim. Rep. 281; Week. Rep. 1854-5, p. 581.

SOLICITOR.—*Lien—Upon deeds in the hands of third parties—On engrossments—Redemption of a mortgagee by party having lien.*—The following case presents some points of great interest to the profession respecting the lien of a solicitor upon deeds, and in which it was held that the acceptance by a solicitor of another security for part of his debt does not affect his lien for the sum not covered by the security.—The plaintiffs were solicitors employed by S. to sell a house belonging to him, which was mortgaged, together with other property, to L. and R. The mortgagees agreed to release the house from their mortgage in order to facilitate the sale on receiving £398. The plaintiffs prepared the engrossments of the deeds of re-conveyance, which they sent to the solicitors of the mortgagees for execution, with a letter, stating that they claimed a lien on them for costs due from S., and desiring that the deeds might be held on their account. The mortgagees executed the deeds, which were retained in the hands of their solicitors as security for the £398 till it should be paid. S. afterwards became bankrupt: Held, in a suit against his assignees, first, that the plaintiffs had not a mere dormant lien on the deeds, but a lien coupled with an agreement; secondly, that their lien on the engrossments was not lost by sending them to the mortgagee's solicitors, nor by their execution; thirdly, that they had such a charge upon the deeds that they were entitled to redeem them by paying the debt of £398 to

the mortgagees, and to hold the deeds against the assignees of *S. Watson v. Lyon*, Week. Rep. 1854-5, p. 543; 25 Law Tim. Rep. 230.

SOLICITOR.—*Lien of [ante p. 2].—On real estate recovered.*—Though courts of equity refuse to part with a fund in court, produced by the exertions of a solicitor, until his costs of recovering it have been discharged; yet a solicitor has no lien upon real estate recovered by him for his costs and expenses incurred in such recovery. The taxing masters' certificate is not an order for the payment of money within the 1 and 2 Vic. c. 110, s. 18. *Shaw v. Neale*, 1 Jur. N. S. 666.

SOLICITOR.—*Being trustee, no costs* [vol. 1, pp. 331, 332].—We may state that the decision of V. C. Stuart to the effect that, where a solicitor is a trustee under a will, and his firm are employed by his co-trustee, who was also sole executor of the trust, to act in the administration of the estate out of court, they are entitled to costs out of pocket only, has been confirmed by the Lord Chancellor. *Broughton v. White*, Week. Rep. 1854-5, p. 602.

TRUSTEE.—*Vesting order—Copyholds—Consent of lord* [vol. 1, pp. 261, 303, 304, 375].—The consent of the lord to a vesting order with respect to copyholds, is necessary when the legal estate in them has actually descended. *Re Howard*, Week. Rep. 1854-5, p. 605.

TRUSTEES.—*Charity—"Charitable Trusts' Act, 1853"* [vol. 1, pp. 90, 195, 412].—*"Trustees' Act, 1850"*—*"Sir Samuel Romilly's Act"*—*Vesting order* [vol. 1, p. 407].—There having originally been 14 trustees of a charity, some of whom were dead, some abroad, and some who declined to act, the number of acting trustees became reduced to two. Legal estates being outstanding in such of the trustees as were abroad and refused to act, and twelve new trustees having been elected in pursuance of a power given by the deed founding the charity, the commissioners acting under the Charitable Trusts' Act, 1853, authorised a summons to be taken out in the matter before Stuart, V. C. The Vice-Chancellor having investigated the facts in chambers, and a petition having been presented, entitled, in the matter of the charity and of the "Charitable Trusts' Act, 1853," and of the "Trustees' Act, 1850," and praying for removal of the trustees who were abroad and of those who refused to act, for confirmation of the appointment of the trustees who had been elected, and for a vesting order, the same was ordered accordingly. *Re Lincoln Primitive Methodist Chapel*, Week. Rep. 1854-5, p. 600.

EQUITY PRACTICE.

COSTS.—*Sale under the court—Two copies of abstract—Costs of considering and replying to queries.*

—Under the old practice of courts of equity, in a sale under the court, it was not usual to make two copies of the abstract of title, except in special cases, but by an order of the Court of Chancery, under Lord St. Leonard's Act (15 & 16 Vic. c. 86), when an estate is sold by direction of the court there must be a reference to the conveyancing counsel of the court to settle the conditions of sale (15 & 16 Vic. c. 86, s. 56, stated 1 Chron. p. 306). The Master of the Rolls has decided that on a sale under the direction of the court, the costs of a second copy of the abstract will not be allowed, but only such parts thereof as have become useless from the counsel having made remarks in the margin thereof, and the solicitor's charges for considering and replying to the counsel's inquiries are not to be allowed as a matter of course, but are in the master's discretion. *Rumsey v. Rumsey*, Week. Rep. 1854-5, p. 589; 25 Law Tim. Rep. 241.

LANDS CONSOLIDATION ACT.—*Payment of dividends of purchase money in court to tenant for life of lands taken—Incumbrancers.*—A company had given notice of their intention to take lands, the value of which had been computed by a jury, on a proceeding between the company and the tenant for life only, empowered under the act to bind the remainderman, and the money had been paid into court, and invested in consols. The vendor had incumbered his life estate with two annuitants, between whom and the company no proceedings had been had. Upon an application of the tenant for life and incumbrancers for payment of the dividends to the former, an order was granted, prefaced with an undertaking by the annuitants never to proceed to recover their annuities, or any portion of them, as against any portion of the land taken by the company. *In re The London and Tilbury Railway Company*, 1 Jur. N. S. 654.

TITLE.—*Reference to chambers—Conveyancing counsel—Approval of title.*—By sec. 40 of the 15 & 16 Vic. c. 80, the Court of Chancery, or any judge at chambers, may receive and act upon the opinion of any of the conveyancing counsel appointed by the Lord Chancellor in the investigation of the title to an estate, or with the view to an investment of money in the purchase or mortgage thereof: V. C. Stuart has held that in every case where the evidence in favour of the title of lands to be purchased with the sanction of the court is not immediately conclusive the question must be referred to chambers for investigation, and an assurance that the title has been approved by an eminent conveyancer, not present, will not be sufficient to satisfy the court. *Re Jones*, 25 Law Tim. Rep. 223; Week. Rep. 1854-5, p. 561.

WILL.—*Money—Residue—Corpus.*—A testatrix,

after directing her funeral expences and just debts to be paid, and giving certain legacies and annuities, added, "after all the legacies are paid, and a sum placed in the name of two trustees to answer for the annuities, I leave whatever money remains, or whatever money I may be entitled to, or may have left me, to M." She afterwards made some specific bequests, and concluded, "If I have omitted naming anything I leave it to my two sisters." Held, that there was a general residuary bequest to M., and that the corpus required for payment of the annuities passed by that bequest after the annuities were satisfied. *Barrett v. White*, 1 Jur. Rep. N. S. 652.

COMMON LAW.

AGENT.—*Authority of agent* [vol. 1, pp. 60, 215] —*Where principal not liable for a false representation by his agent.*—We have before (vol. 1, p. 215) considered the subject of an agent's authority to bind his principal, and the following observations and decision may be usefully added to what is there stated. The cases in which a principal has been held liable for the fraudulent acts of his agent done in the course of his employment are generally cases of acts done by the servant in the sale or manufacture of articles which the principal deals in or manufactures, and where, therefore, the servant is merely acting in the business of the master, and within the scope of the authority which he actually receives from the master. But these cases are very different from those where the act is not done by the agent pursuant to any authority conferred on him by his principal. In the case of the sale of a horse, *Ashurst, J.*, in *Fenn v. Harrison* (3 Term. Rep. 760) said, "I take the distinction to be that if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognisant of any private conversation between the master and servant. But if the owner of a horse were to send a stranger to a fair with express directions not to warrant a horse, and the latter acted contrary to his orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment." In the case of *Pickering v. Buak* (15 East, 45), *Bayley, B.*, says, that "if a servant of a horse dealer, with express directions not to warrant, do warrant, the master is bound, because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circum-

scribed." These observations will explain the following decision:—The plaintiff, a miller, was in the habit of purchasing wheat, and directing the sellers to deliver the wheat at the landing place, at Bristol, of the defendant, a wharfinger and carrier, to be carried by the defendants from Bristol to Cardiff. B., the defendant's agent at Bristol, gave receipts to the sellers for the wheat when delivered, and the plaintiff was accustomed to pay for the wheat upon the production of such receipts, but there was no contract between the plaintiff and defendant that receipts should be given, on the faith of which the plaintiff might pay: Held, that B. had a limited authority to give receipts only when wheat had been delivered, and, therefore, where B. fraudulently signed a receipt for wheat delivered when none in fact had been delivered, this was held to be not an act done within the scope of his authority as agent, for which the defendant, as principal, was responsible to the plaintiff, who had paid to the seller the price of the wheat on the faith of the receipt being true. *Coleman v. Riches*, 1 Jur. N. S. 596.

ATTORNEY.—*Attorney's bill*—6 & 7 Vic. c. 73, s. 37 [1 Law Chron. 403]—*Bill addressed to party liable to pay.*—The question in this case turned upon the construction of the above statute, the 37th sec. of which enacts that no attorney or solicitor, executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by them, until the expiration of one month after they shall have delivered unto the party charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last-known place of abode, a bill of such fees, &c.; and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners), or be inclosed in or accompanied by a letter, subscribed in like manner, referring to such bill (see section set out 1 Law Chron. p. 403). The facts of the case were as follows:—In an action on an attorney's bill brought against the executors of T. R. for business done for the deceased, headed in the matter of the bankruptcy of T. R., and signed by the plaintiff, was enclosed in an envelope addressed "the executors of the late T. R.," and left at the residence of one of the executors, but neither the names of the executors nor that of the testator were mentioned either at the head of the bill or in any part thereof: Held, that it was a good delivery of the bill according to the above statute. *Lucas v. Roberts*, 1 Jur. N. S. p. 527.

CORPORATION.—*Contracts by not under seal*—*Trading corporation distinguished from municipal corporations*—*Contracts incidental to the purposes of in-*

corporation.—In the case of municipal corporations, and other corporations not established for the purposes of trade and navigation, the strict rule still applies, that their contracts must, except as to matters of small amount and frequent occurrence, be under seal (see *Ludlow v. Charlton*, 6 Mees. and W. 815; *Arnold v. Poole*, 4 Man. and Gr. 860; *Paine v. Strand Union*, 8 Qu. Ben. Rep. 326; *Smart v. West Ham Union*, 24 Law Tim. Rep. 277). The strictness of the ancient rule, which prohibited corporations from contracting except under the corporate seal, has been gradually more and more relaxed, and, though at first the exception was considered to extend only to matters of small amount and frequent occurrence, in later times, owing to the great increase in the number of trading corporations, the relaxation has been greatly extended, and the result of many decided cases is this—that in the case of a trading corporation the contract will be binding, though not under seal, if it is of a nature essentially incident to the purposes of incorporation. The authorities are reviewed in *Clarke v. The Cuckfield Union* (21 Law Journ. Q. B. 29), and according to these decisions a contract directly within the scope and purpose of the undertaking for which the defendants are incorporated is binding upon the defendants though not under seal. This view of the law has been sanctioned by the Court of Queen's Bench in the following case:—The directors of a company incorporated by charter for the purpose of maintaining communication between Great Britain and Australia, by steam and other vessels, made at a board meeting an agreement on behalf of the company, but not under their corporate seal, with the plaintiff, that in consideration of his going out to Australia, and bringing home one of their vessels, which was unseaworthy and uninsurable, for the purpose of having it repaired for the company, the company, besides certain monthly wages, would give him a remuneration proportionate to his success: Held, in an action against the company for such proportionate remuneration, that the company, being a trading corporation, and the contract being incidental to the objects for which they were created, they were liable on the contract, although not under their corporate seal. *Henderson v. The Australian Royal Mail Steam Navigation Company*, Week. Rep. 1854-5, p. 571; 25 Law Tim. Rep. 234.

EVIDENCE.—*Unstamped agreement—Parol evidence.*—It is a general rule of evidence, that the best, or, rather, the highest evidence must be given that the nature of the case admits of, so that where a contract has been reduced into writing by the parties, the writing, as being the best evidence, must be produced, and the mere fact that the writing is not stamped will not let in parol evidence. The

primary evidence in this case was a written agreement, which ought to have been, but was not, stamped, and the defendant objected to its admission on the ground of the want of stamp. The plaintiff contended that the agreement, being unstamped, was a nullity, and asked to be admitted to furnish parol evidence: Held, that though inadmissible, the agreement was not a nullity so as to admit of parol evidence being given of the terms of the arrangement. *Delany v. Alcock*, 1 Jur. 498.

INDEMNITY.—*Bail—Recognisance estreated for non-payment of prosecutor's costs—Implied indemnity.*—The defendant in this cause had been indicted for conspiracy, and the indictment removed into the Queen's Bench. The plaintiff had become the defendant's bail. The defendant, not appearing, was convicted in his absence, and the recognisance estreated for non-payment of the costs of the prosecutor, and the plaintiff having been obliged to pay the money, brought the present action against the defendant, alleging that there was an implied contract by the defendant to indemnify him. On moving for a rule, it was contended that such a contract could not be implied, because it would be illegal to indemnify against not surrendering in a criminal case: Held, that it was unnecessary to decide that point; that, according to the statute 5 Will. and Mary, and the practice of the court, a party's bail become liable to the payment of the costs of the prosecutor upon conviction; that there was an implied contract on the part of the defendant to indemnify the plaintiff against this payment, and the plaintiff might recover under a count for money paid; that if it is illegal to enter into a contract to indemnify for non-appearance pursuant to recognisance, the court will not infer such contract. *Jones v. Orchard*, Week. R. 1854-55, p. 554.

JUDGMENT.—*Mistake—Execution—Amendment of particulars of demand.*—According to the practice of the courts, a defendant may, after judgment has been signed and executed, apply by summary application to have the judgment set aside on the ground of mistake, he paying the costs and doing all that is necessary to restore the plaintiff to as good a position as he would have been, if no such mistake had occurred. It has never been doubted, too, that, in case of fraud, the court may set aside a judgment; they ought to have the same power in case of mistake, which is as good a ground for equitable relief. If the application may be made by a defendant, it may also be made by the plaintiff; and by both the condition must be observed, that the opposite party does not suffer any prejudice. Lapse of time, also, is often an answer to such applications. The application need not be made *eo instante*, nor after an unreasonable lapse of time. *Cannon and Others v. Reynolds*, 25 L. T. Rep. 176.

JUDGMENT.—*Judgment creditor*—1 & 2 Vic. c. 110, s. 16—*Attachment—Debtor's property*.—By the common law a judgment creditor who thought fit to resort as his mode of execution to the seizing of the person of his debtor as a satisfaction of the debt, was held thereby to have lost his right against the property. This old and essential principle of the common law was founded on the terms of the writ. The above-mentioned statute preserves that principle untouched, notwithstanding its new provisions respecting judgments. But it applies in no degree to the case where a person is taken under an attachment in the Court of Chancery. In this case the debtor is not "taken in execution" under an attachment at all. He is taken into custody to answer his contempt for his disobedience to the order of the court. That seizing of his person is a satisfaction of nothing, but is only a mesne process in furtherance of the creditor's other remedies against the property: Held, that the seizing of a debtor's person under an attachment for non-payment of money under a registered decree is not such a taking of the person in execution within 1 & 2 Vic. c. 110, s. 16, as to involve release of any debt or any other claim against the property of that debtor. *Roberts v. Ball*, Week. Rep. 1854-55, p. 466; 25 Law Tim. Rep. 139.

LIBEL.—*Privileged communication—Bonâ fides of defendant*.—The libel complained of in this case was a memorial addressed to the Secretary of State, complaining of the plaintiff's conduct as a magistrate at an election for the borough of——, and requesting his removal from the office of a justice of the peace, and the jury having found that the memorial was *bonâ fide*, the question, arose whether it was a privileged communication; one of the elements of privileged communication *bonâ fides* being found, the two others remained to be decided—viz., whether there was an interest on the part of the communicator, and whether the communication was made to the proper quarter; and the court held: 1st, that the communicator had an interest, and acted in pursuance of a duty, every one having an interest in not remaining subject to the jurisdiction of one who violated the law, and who had committed an offence which ought to be inquired into. "In this land of law and liberty," said Lord Campbell in delivering his judgment, "all persons may try, by all constitutional means, to obtain redress, and, with that view, may bring the conduct of a party before those whose duty it is to enquire into it;" 2ndly, the communication was made to the proper quarter—being addressed to the Secretary of State, it was virtually an address to her Majesty, the Secretary of State having a corresponding duty to perform in the matter. *Harrison v. Bush*, Week. Rep. 1854-55, p. 474.

LIMITATIONS, STATUTE OF.—4 Ann, c. 16, s. 19—*Defendant abroad*.—The first Statute of Limitations is that of 21 Jac. 1, c. 16, the 7th sec. of which enacts that if any person entitled to such action of trespass, detinue, trover, replevin, debt, trespass for assault, and actions upon the case for words, shall be at the time of such action accrued within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or *beyond the seas*, such persons shall be at liberty to bring the same action within such times as are before limited, after their being of full age, discover, of sane memory, at large, and returned from beyond the seas. This act provided only for plaintiffs under disability; a defendant, whether abroad or not, could avail himself of the statutes of limitations. To prevent the bar of the statute he had to file an original, and outlaw the debtor. This was remedied by 4 Ann, c. 19, by which, "if any person against whom there is any cause of action for seaman's wages, or of action upon the case, shall be, at the time of such cause of action accrued, beyond the seas, the action may be brought against such person after his return from beyond the seas within the time limited by 21 Jac. 1, c. 16. In an action on a promissory note, to which the defendant pleaded "that the supposed causes of action in the declaration mentioned did not accrue to the plaintiffs at any time within six years before the commencement of the suit: Held, that the replication need not allege that the defendant has returned from beyond seas, or that the suit was commenced within six years after his first return from beyond seas since the accruing of the cause of action. The Statute of Limitations should be construed thus: you should see what is the limit within which the plaintiff is to bring his action. If the plaintiff is abroad he has six years from his return, but he is not barred from bringing his action until that return, and six years after the return. That applies to the case of a defendant; so that the plaintiff is not barred until the expiration of that period of time which is given when he is abroad himself. *Forbes v. Smith*, 1 Jur. N. S. p. 509.

MASTER AND SERVANT.—*Tailor, "Artificer"*—*Journeyman tailor—Contract for personal service—Absence from service*.—The 3rd sec. of 4 Geo. 4, c. 34, enacts, "that if any servant in husbandry, or any artificer, handicraftsman, &c., labourer, or other person, shall contract with any person or persons whatsoever to serve him, her, or them for any time whatsoever, or having entered into, shall absent himself from service before the term of his contract shall be completed, or neglect to fulfil the same, &c., upon complaint on oath a justice of the peace may issue his warrant for the apprehension of the offender and commit him to prison: upon this section it was

held, that a tailor is within the act as an "artificer" or handicraftsman and where a journeyman tailor contracted with a master tailor to make certain garments at fixed prices, to work on the master tailor's premises exclusively for him whilst employed and not to leave whilst any garment on which he might be employed was unfinished, and he absented himself without finishing a garment on which he was employed, a justice had jurisdiction in convicting him for breaking his contract. *Ex parte Gordon*, Week Rep. 1854-55, 569.

PRINCIPAL AND AGENT.—*Written instrument—Personal liability of agent* [see 1 Law Chron. 221—223, 394—396].—A contract duly made by an agent is considered by law as the contract of the principal, from which it follows that the latter is entitled to enforce it by suit in his own name, and is also liable to be personally sued upon it; yet when the agent has pledged his own personal credit, he would be liable, not less than the principal, to be personally charged on the contract. Where, in a written agreement, every act to be done *for and on behalf of the principal* was expressed to be done either by the agent or to the agent, and the agreement was signed by the agent simply, and not as for a third person: Held, that the agent was personally bound, although there was a statement in the instrument appended to each undertaking expressed as to be performed by him, that he was acting of one E. N. *Tanner v. Christian*, 1 Jur. N. S. 519, stated 1 Law Chron. 395.

PROMISSORY NOTE.—*Payable on demand—Demand previous to action.*—In an action upon a promissory note, the declaration stated that the defendant on the, &c., by his promissory note, promised to pay to the plaintiff £—upon demand, but did not pay the same, and the plaintiff claimed £—. Demurrer by defendant on the ground that no demand was alleged and, consequently, no cause of action shown; Held, that no demand was required previous to the bringing of an action for the amount. *Barrett v. Meredith*, 25 Law Tim. Rep. 166.

SHIPPING.—*Passenger's Act, 15 & 16 Vic. c. 44, ss. 49 and 50—Policy of insurance—Forwarding passengers to their intended destination.*—By the Passenger's Act, 15 & 16 Vic. c. 44, s. 49, if any passengers of any passenger-ship shall, without any neglect or default of their own, find themselves in any foreign or colonial port other than that at which they may have contracted to land, and the master of the ship shall decline or omit within six weeks thereafter to forward them on to their original destination, it shall be lawful for the governor of such colony to forward such passengers to their intended destination; and by sec. 50, all expences incurred under

the last two preceding secs., or either of them, shall become a debt to her Majesty from the owner, charterer, and master, &c.: Held, that the duty to forward passengers within the six weeks under the circumstances mentioned in the sec. is imposed upon the master by implication in sec. 49. Therefore, that a policy of assurance by the owners against all liabilities to which they might become liable by perils of the sea, under ss. 49 and 50, covered a liability for the expences incurred by the captain in forwarding, without the intervention of the governor, and before the lapse of six weeks, passengers who were detained by loss of the ship in a colony to which they were not ultimately destined. *Gibson v. Bradford*, 1 Jur. N. S. 520.

SIMONY.—*Exchange of benefices—Dilapidations—Simoniacal agreement to forego claim for dilapidations on exchange.*—Having already (vol. 1, pp. 178—183) so fully noticed the doctrine of simoniacal contracts and engagements, it is scarcely necessary to do more than call the reader's attention thereto before introducing the case presently noticed. We may, however, observe, that though sec. 8 of the 31 Eliz. c. 6 (set out 1 Chron. p. 178) extends to corrupt exchanges of benefices, yet it is clear that the taking of a benefit thereby is not necessarily "corrupt" within the meaning of the statute, for, as Best, C. J., said in *Fletcher v. Sondes* (3 Bing. 583), "in exchanges each party proposes to himself some benefit; the one expects to get more profits, the other a more healthy and agreeable or advantageous residence. Yet exchanges are expressly allowed by the statute of Elizabeth, because exchanges, though productive of temporal advantages to one or both parties, are not the vile and corrupt contracts which were intended to be prohibited by the legislature." In *Downes v. Craig* (9 Mees. and W. 166), Lord Abinger said: "It might be a very considerable question whether, if a contract for the exchange of livings were made in writing, with an express declaration that neither party should sue the other for the dilapidations, or if one party said 'If you will admit me to your living I will admit you to mine, and I will make no claims for dilapidations,' it would not amount to a simoniacal contract, and so would be void. At present I do not see that it makes any difference whether it be a contract with a party to resign in favour of another, or whether it be a contract for an exchange which may possibly fail in the completion." And Parke, B., said, "I cannot help concurring in the doubt which has been expressed by my lord, whether it (an agreement between the parties that if the livings were exchanged each should omit to sue the other, and, in effect, give up to the other any claim for dilapidations) would be valid and binding. It appears to me to savour of simony."

And Rolfe, B., took the same view, saying, "Upon the whole I entirely concur in the opinion which has been expressed, and particularly in the doubt intimated by my lord, whether an agreement to waive the claim for dilapidations would have been a valid agreement." It has lately been decided by the Court of Common Pleas that an agreement by two incumbents to exchange their livings in their present state, and that one of them shall not call on the other to pay for repairs, is not necessarily simoniacal. *Semble*, first, if the dilapidations in each living were nearly equal, an agreement mutually to forego the amount would not be simoniacal. Secondly, so if the dilapidations in one living were of an insignificant amount, an agreement that the incoming incumbent should forego such amount would not be simoniacal. Thirdly, if facts are pleaded which show that an agreement must necessarily be simoniacal, it need not be alleged that the agreement was made "corruptly," in order to bring it within the 31 Eliz. c. 6. *Goldham, Clerk, v. Edwards, Clerk*, 1 Jur. N. S. 684.

TROVER.—*Fixtures—Ladder, Crane, Gaslight fittings.*—The definition of fixture implies that to be a fixture the thing must not constitute part of the principal subject, as in the case of the walls of a house, and that on the other hand, it must be in some actual union or connection with the principal subject, and not merely brought into contact with it as in the case of a fixture suspended on hooks against a wall, or a wooden barn resting by its weight alone upon a brick foundation (see 2 Smith's Leading Cases, 114): Held, that a ladder fixed by rails to the joists above, and to the floor below—a crane fixed to the ceiling and floor by nails—a flapped bench nailed to the wall—gaslight fittings fixed in the usual way—were fixtures considered as part of the freehold, and are not such goods as are the subject of an action of trover. *Wilde and Another v. Waters*, Week Rep. 1854-55, 570.

WAGERS.—*Wagering contracts*—8 & 9 Vic. c. 109—*Money paid—Pleading.*—This statute (the act to amend the law concerning games and wagers) makes gaming and wagering contracts void, but not illegal; therefore, the payment of the losses under such contracts is not illegal. Where the declaration was for money paid by the plaintiff for the defendant's use, at his request; and the plea that the money was paid, as mentioned in the declaration, in respect of certain differences in the price of shares in a public company, contrary to the 8 & 9 Vic. c. 109, which the plaintiff had made for the defendant with third persons: Held, that as the plea did not negative the plaintiff's request, and the act made such contracts only void, and not illegal, the plea is no answer. *Knight v. Cambers*, 1 Jur. N. S. 525.

WAY LEAVE.—*No right to soil—Trespass.*—The mere grant of a way leave does not pass the exclusive, or, indeed, any right to the soil, so that no person having any such grant merely can maintain an action of trespass. *Meynell v. Surtees*, Week Rep. 1854-5, p. 535; 25 Law Tim. Rep. 227.

COMMON LAW PRACTICE.

ARBITRATION.—*Award by several arbitrators—Invalidity of award—Attachment.*—In *Stalworth v. Jones* (2 D. and L. 428) the Court of Exchequer expressed their opinion that the execution of an award should be joint, and that where an award was not so executed the court would not enforce performance of it by attachment. And see *Wade v. Dowling*, 1 Law Chron. 172. In the present case an affidavit showed that the appointment of an umpire had been signed by arbitrators separately, and not jointly as it ought to be (*Wright v. Graham*, 3 Exc. 131; *Wade v. Dowling*, 4 E. and B. 44): Held, that the affidavit was admissible and conclusive against the right to an attachment for disobeying the award made by the umpire—the other party, however, preserving his remedy, as he may bring his action on the award. *Lord v. Lord*, Week Rep. 1854-55, p. 553.

COSTS.—*Document lost by attorney's negligence—Expense of secondary evidence disallowed.*—The following case, which occasioned the Court of Exchequer to be equally divided in opinion, is of some practical importance to the profession. Before the trial of an action on a bill of exchange, and after the action had been commenced, the bill was accidentally thrown into the fire as waste paper by the carelessness of the clerk of the plaintiff's attorney, and destroyed; it therefore became necessary at the trial to prove the bill by secondary evidence, and the plaintiff had a verdict. The expense of the secondary evidence was claimed by the plaintiff on taxation of the costs in the cause, and was disallowed by the master: Held, *per* Pollock, C. B., and Martin, B., that the plaintiff was not entitled to costs; *per* Alderson, B., and Platt, B., that the master could not inquire whether the secondary evidence was rendered necessary by negligence, and that they should, therefore, have been allowed. *Matthews v. Levesley*, Week Rep. 1854-5, p. 317; 25 Law Tim. Rep. 166.

COSTS.—*Costs of the day where plaintiff does not proceed to trial* [vol. 1, p. 311]—*Default of defendant*—Reg. Gen. H. T. 1853-4, r. 49.—When notice of trial having been given, but upon the cause being called on neither the attorney for the plaintiff nor the defendant are present, the defendant is not entitled to the costs of the day under the 49th sec. of the above Reg. Gen. The parties are in *pari delicto*; the defendant concurred in the plaintiff's neglect.

It is the consequence of the defendant's own fault that he incurred costs which were of no use; for if he had been there he might have craved judgment of *nonsuit* (*Allott v. Bearcroft*, 4 D. and L. 327, does not apply). *Morgan v. Fernyhaugh*, Week. Rep. 1854-55, p. 551.

COSTS IN ERROR [1 Chron. 276, 381, 419].—*Court below has no control over.*—At common law, in ordinary cases, a court of error could only reverse the judgment where error was brought by the defendant below; but where it was brought by the plaintiff below it gave such judgment as the court below ought to have given; but by the common law procedure act, 1852, a proceeding in error is made a step in the cause; the judgment court of error is to be entered on the original record; and courts of error are empowered to give such judgment and award such process as the court from which error is brought ought to have done, without regard to which of the parties it is who alleges error; the further proceedings which may be necessary thereon may be awarded by the court in which the original judgment was given. It has been decided that the court below has no such control over the taxation of costs after judgment in the court of error, as to enable it to direct the master to allow the plaintiff the costs of a matter with respect to which the judgment of the court below against him had been reversed. *Elliot v. Bishop*, Week. Rep. 1854-5, p. 596.

JUDGMENT BY DEFAULT.—*Application to set aside—Affidavit*—C. L. P. A., 1852, s. 27.—This section requires, in order to entitle a party, against whom judgment has been allowed to go by default, to be let in to defend, that the affidavits should "disclose a defence upon the merits," held that it is not necessary that the affidavit should show what the defence is, but the ordinary affidavit of a good defence on the merits, is sufficient. *Warrington v. Leek*, Week. Rep. 1854-5, p. 552.

JUDGMENT.—*Enforcing by attachment against garnishee* [vol. 1, pp. 160, 271—274, 419; ante, p. 22]—*Common Law Procedure Act, 1854, s. 61*—*Public company whose creditors to be paid pari passu—Property only liable.*—The Westminster Improvement Commissioners were appointed for the purpose of executing certain works in Westminster, and were empowered by act of Parliament to borrow money on bond and on mortgage of their lands or funds. They borrowed money under their powers, and subsequently it was agreed by the bondholders, and the agreement ratified by act of Parliament, that they should be paid *pari passu*: Held, that a bond given by the commissioners was not a debt that could be attached by a creditor of the bondholder under the

garnishee clauses of the Common Law Procedure Act, 1854, because, 1, the property only of the company was chargeable; and 2, to attach the debt would be giving a preference to the particular bondholder over all the others, in violation of the agreement and act of Parliament. *Kennett v. The Westminster Improvement Commissioners*, Week. Rep. 1854-5, p. 597.

MARRIAGE.—*Marriage of female defendant after judgment—Execution against husband*—C. L. P. A., 1852, sec. 141.—This section provides, "that the marriage of a woman plaintiff or defendant shall not cause the action to abate, but the case may, notwithstanding, be proceeded with to judgment; and such judgment may be executed against the wife alone, or by suggestion, or by writ of revivor pursuant to this act, judgment may be obtained against the husband and wife, and execution issue thereon," &c. But this section is not applicable where judgment has been signed before the marriage against a wife *dum sola* so as to authorise the plaintiff to suggest the marriage upon the record, and issue execution against the husband. *Morris v. Coates*, 25 Law Tim. Rep. p. 176.

WRIT OF SUMMONS.—C. L. P. A., 1852, ss. 2 & 18.—The plaintiff having issued a writ of summons against the defendant under s. 2 of the C. L. P. A., 1852, sched A., No. 1, specially indorsed, applied to a judge upon affidavits (stating facts showing efforts to serve him) for leave, under s. 27, to proceed under the act as if personal service had been effected, whereupon an order was made. Subsequently the defendant applied to this court to set aside such order, upon the ground that, at the time of issuing the writ, and down to the time of swearing the affidavit upon which the motion was made he (the defendant) was out of the jurisdiction: Held, that under these circumstances the defendant ought to have been proceeded against as provided for by sec. 18: Held, also, that the motion was in the right form—viz., to set aside the judge's order. *Hasketh v. Fleming*, 25 Law Tim. Rep. p. 102.

CRIMINAL LAW SESSIONS, ETC.

ERROR.—*Misdemeanor—Fiat of Attorney-General—Offence out of jurisdiction of court.*—In misdemeanors, on showing probable cause, a defendant is entitled to a writ of error *ex debito iustitie*, and the Attorney-General ought to grant his fiat where there is good or probable ground of error. But the granting of a fiat is on his discretion, and when he has heard and decided the application, the Court of Queen's Bench cannot interfere, it being a universal maxim that where a discretion is to be exercised by an officer this court will not interfere. It is a fundamental principle that a party cannot assign for error what

contradicts that which the jury have found upon their oath. Where, therefore, there is a finding and judgment that the place where the offence was committed was within the jurisdiction of the court, it cannot be assigned as ground of error that the offence was committed out of its jurisdiction. *Reg. v. Newton and Another*, 1 Jur. N. S. 591.

RECEIVING STOLEN GOODS.—*Actual and constructive possession*—*Direction to the jury*—*Evidence*.—Upon an indictment for receiving a watch, knowing it to have been stolen, the recorder before whom the case was tried directed the jury that if they believed that the prisoner (at the time he was negotiating the return of the watch to the prosecutor) knew that the watch had been stolen, and that if they believe that the watch was then in the custody of a person with the cognizance of the prisoner, that person being one over whom the prisoner had absolute control, or that the watch would be forthcoming, if the prisoner ordered it, there was ample evidence to justify them in convicting the prisoner of feloniously receiving the watch. The jury found the prisoner guilty: Held, that the direction to the jury was unexceptionable. According to the cases and the dicta of learned judges, manual possession of the stolen article is not necessary to support a conviction for feloniously receiving it is sufficient if the goods are shown to have been under the control of the person charged with receiving. *Reg. v. Thomas Smith*, Week Rep. 1854-55, 575.

SESSIONS.—*Appeal*—*Notice of, to prosecutor, when act does not require it to be given*—*Master Stewart*—*Combination act*—6 Geo. 4, c. 129, s. 12—*"Immediately"* dismissal.—Where a party is convicted under an act of parliament which gives an absolute right of appeal without requiring notice of such appeal to be given to the opposite party, it is yet necessary for the appellant to give notice to the opposite party within a reasonable time from the conviction. The Quarter Sessions should not refuse to hear an appeal when it appears that the notice of appeal could not have been reasonably given according to the rules of the court. The 12th sec. of the 9 Geo. 4, c. 129 (an act to repeal the laws relating to the combination of workmen and to make other provisions in lieu thereof, gives a convicted person the right of appealing to the next quarter sessions and enacts that the execution of every judgment so appealed from shall be suspended in case the person so convicted shall immediately enter into recognisances before such justices, upon condition to prosecute the appeal, and to be forthcoming to abide the judgment of the said quarter sessions, and gives the quarter sessions power, on affirmation of the conviction, to commit the appellant to gaol according to the conviction below. A party convicted on Saturday,

24th March, entered into recognisances to appeal on the 29th, and was liberated on the 30th. On the following 8th April the appeal was called on for hearing at the quarter sessions, and dismissed on the ground that the appellant had not given a fortnight's notice according to the practice of the sessions and the warrant of the court made out for his committal to prison to undergo the sentence in the conviction. This warrant was executed on the 2nd May, the defendant being alleged to have kept out of the way in the meantime. Held that the sessions were wrong in dismissing the appeal and making out their warrant for the recommittal of the defendant, and that the defendant being in custody upon this, was entitled to his discharge, and that the appeal not having been heard, the proper course was to enter and respite the appeal until the next sessions. Held also that the word, "immediately" in the 12th section, means within a reasonable time, and therefore that entering into recognisances on the 29th, was a compliance therewith. Held also, that the recognisances remained in force, the sessions not having heard the appeal. *Reg. v. The Justices of Durham* 25 Law, Tim. Rep. 196; Week. Rep. 1854-5, p. 516.

BANKRUPTCY AND INSOLVENCY.

CERTIFICATE.—*Refusal of certificate*—*Execution*—*Release*.—A bankrupt had his certificate refused. Shortly after a creditor who had proved his debt took out a bankruptcy certificate under the 257th sec. of the Bankruptcy Law Consolidation Act, upon which a writ of execution was issued, and the bankrupt taken in execution. Upon a motion to discharge the plaintiff under the allegation that the court had a discretionary power under sec. 259, and that an imprisonment of three months was a sufficient punishment: Held, that the court had no power to order the release before the expiration of twelve months without the consent of the detaining creditor. The imprisonment of a debtor is not for the purpose of punishment, it is for the purpose of forcing him to pay. *Ex parte Latham, Jun.*, 25 Law Tim. Rep. 195.

FUTURE PROPERTY.—*Assignment of future acquired property*—*Equitable order by the court*.—The 88th section of the Insolvent Act provides, that where an insolvent after his discharge shall become entitled to or be possessed in his own right of any property, and such insolvent shall have refused to convey or assign the same to the amount of the debts from which he was discharged, it shall be lawful for the assignee to apply by petition in a summary way to the court, to obtain his commitment to prison until he assign. The court, in the case where an insolvent became entitled to future acquired property which could not be taken in execution, made an equitable order to meet the

justice of the case, by which a conditional order to commit the insolvent was granted, with directions that it should not issue if the insolvent executed the assignment. *Re Rogers*, 25 Law Tim. Rep. 135.

JURISDICTION.—*Exclusive Nuisances Removal Act*, the 11 & 12 Vic. c. 123, s. 3—*Certiorari*—*Title to land*.—By the 11 & 12 Vic. c. 123, s. 3, the expenses of obtaining and enforcing an order for the removal of a nuisance, are to be deemed to be money paid for the use of the owner or occupier, and may be recovered as such in the county court, or before two justices: Held, that, where the proceedings are taken in the county court, that court has exclusive jurisdiction, and that no certiorari will, therefore, lie to remove the plaintiff, even though the title to land come in question. *Guardians of the poor of the Hertford Union v. Kimpton*, Week Rep. 1854-5 p. 521; 25 Law Tim. Rep. 185.

REPUTED OWNERSHIP [vol. 1, pp. 63, 76, 132, 350, 384, 441, 458].—By sec. 125 of the Bankruptcy Consolidation Act, 1849, where the bankrupt has goods in his possession, with the consent of the true owner, the court may direct same to be sold for the benefit of the creditors: this order vests the property in the goods in the assignee or their vendee as from the time of the act of bankruptcy. The effect of this provision, which often operated very harshly, has lately been much mitigated by a decision of the Queen's Bench applying the provisions of sec. 133 of the Consolidation Act to the reputed ownership doctrine. This 133rd sec. provides that contracts, dealings and transactions prior to a petition for adjudication shall be valid though there was a prior act of bankruptcy, of which the party had no knowledge. The court held, that the object of 12 & 13 Vic. c. 106, s. 133, is to give the same force to contracts, dealings, and transactions with the bankrupt made before the filing of the petition, as they would have had if made before the act of bankruptcy. Where goods by the consent of the true owner, are left in the order, and disposition of the bankrupt, but such consent is *bona fide*, and without notice of the act of bankruptcy, determined subsequently to the act of bankruptcy, but before the filing of the petition for adjudication, the goods will not pass to the assignees although the owner do not obtain actual possession before notice of the act of bankruptcy. *Brewin v. Short*, Week Rep. 1854-5, p. 514

COSTS OF THE CROWN.—A bill has been introduced into the commons by the Attorney-General for regulating the costs of proceedings by and against the Crown. It proposes to enact that in future the Crown shall not be exempt from liability to costs in cases in which they would have been allowed to any other suitor, but shall both pay and receive them.

PROFESSIONAL NEWS.

PUBLIC HEALTH BILL.—This is one among the many abandoned measures of this session.

EVIDENCE IN EQUITY.—In a case brought before the attention of one of the vice-chancellors, on the 27th of July last, it appeared that the evidence in a cause was being taken by a special examiner, and that there had already been no less than *forty* meetings for the purpose of taking the evidence. His Honour commented on this state of things in very severe terms. It appeared that the counsel employed belonged to the common law bar, who, according to a rather foolish article in last week's *Law Times*, are alone qualified for this work. The truth is, that oral examinations are the exception and not the rule (see vol. 1, pp. xxvi., 337), of which the writer in the *Law Times* appears to be utterly ignorant.

BILLS OF EXCHANGE BILL.—It appears that the profession is to be favoured with the least noxious of the two bills for facilitating judgment upon and preventing vexatious defences to bills of exchange. Lord Brougham, however, has declared his dissatisfaction with the measure as not being complete enough, inasmuch as the unfortunate signer of a bill is allowed, under proper guarantees, to defend any action brought against him, instead of having a judgment at once entered against him.

FOOTPASSENGERS AND CARRIAGES, &c.—On a recent trial against carriers by a widow of a man who was killed by a van whilst crossing the street, Justice Coleridge said:—"When passing along a street the side pavements were for foot-passengers and the centre of the street was for carriages, and those persons who wished to cross were bound to watch their opportunity—to use due care and caution; but at the end or corner of a street, if a foot-passenger wished to cross, it should be known that the centre of the street belonged as much to the foot-passenger as to the carriage, and he had as much right to tell the driver of a carriage to wait for him as for the driver to make him wait."

JUSTICE TALFOURD.—A bust of the late Mr. Justice Talfourd has just been placed in the Crown Court, Stafford. The base of the monumental tablet in which it is placed bears the following inscription:—"On the judgment-seat of this court, while addressing the grand jury, on March 13, 1854, died Sir Thomas Noon Talfourd, Knt., D.C.L., one of the judges of the Court of Common Pleas, an accomplished orator, lawyer, and poet. The members of the Oxford Circuit erected this memorial of their regard and admiration for their former leader, companion, and friend."

JUSTICES MAULE AND WILLES.

Mr. Justice Maule, having retired from the bench after a service of more than fifteen years, Mr. J. S. Wille, of the common law bar, has been appointed his successor. The appointment has given rise to much observation as the new judge is quite young in years and at the bar, where, however, although only a stuff-gownsmen, he took a leading position. The *Examiner* has given a highly eulogistic notice of Mr. Justice Wille, in which, after mentioning his services on the Common Law Commission, it is said "The services he rendered in that capacity would alone, in our judgment, have entitled him to the position he has now attained. With nothing of the genius of an orator, he possesses the power and capacity of a legislator. To him we are mainly indebted for suggestions that have overthrown during the last few years, to the inexpressible relief of the poor suitor, the clumsier and more intolerable parts of the monstrous fabric of special pleading. To all the recent improvements in common law procedure he has largely contributed by his labours on that commission: and we suspect that not a few absurd distinctions between the practice at common law and at equity would by this time have gone the way of other similar follies if all his suggestions then made had been equally successful. Such a man, so capable, so learned, and with such disposition, will be invaluable on the Bench: and it is greatly to the honour of Lord Cranworth that he should have set before the bar an example, so little open to question, of an appointment dictated only by a regard for the public service. The qualities which the Chancellor has had the best means of testing in the new judge are of a higher kind than those which Mr. Wille has had the opportunity himself of most familiarising to the great body of the Profession, but it is in the union of both we find the rare and conspicuous merit of his appointment. Nor is it less honourable to the Profession itself than to the chancellor that the elevation to a seat in the common pleas of a young man of forty, without anything showy or superficially attractive in his talents, and who had not even sought the dignity of a silk gown, should find such general and cordial approval in Westminster Hall. The truth is, that it is a promotion too manifestly made on the exclusive ground of merit to admit of any fair objection. With nothing to attach him to either party in the state, with only learning and labour to attract influential friends, within a few years utterly unknown, Mr. Wille has forced his way by sheer ability, and been the unaided architect of his own fortune. He is an Irishman, and so entirely was he without influence or connexion in England, that he would have

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returned to Dublin seventeen years ago, when he had qualified for his call to the Irish Bar, but for the earnest remonstrance of the distinguished pleader Mr. Chitty, in whose chambers he was then a pupil. He had graduated at Trinity College with great distinction in 1835, and the next five years were passed in Dublin and London alternately, in the chambers of Mr. Chitty or those of Mr. Collins, an Irish barrister of considerable eminence. His course was not decisively taken till June, 1840, when he was called to the English Bar; and perhaps no man ever achieved so rapidly a first rate practice of so important a kind. Not that the popular impression in this respect is at all the true one, which tells you that great lawyers are wont to starve in their youth, and only to become famous when their wigs cover grey hairs; for the rule rather is, that if a lawyer fails as a young man, he will very rarely indeed succeed as an old one. But it was not merely a large practice speedily obtained in Mr. Wille's case, but a practice in cases of the weightiest kind. Few great questions of mercantile law have been mooted for the last thirteen years without his services on one side or the other, and indeed few have been the important cases of any kind—so sudden and universal became the recognition of his acute judgment and profound acquaintance with the common law—on which some person concerned has not sought his opinion. No elevation to the Bench of a man at once so young and in such extensive practice has taken place since the days of Judge Buller.

 THE HOUSE OF LORDS AS A COURT OF APPEAL—THE LORD CHANCELLOR AND THE SOLICITOR GENERAL.

Much has recently been said as to the disagreement between the Lord Chancellor and the Solicitor General, which, though denied, seems to have some foundation, as evidenced by want of co-operation in some of the recent measures of law reform, and in particular by a late occurrence, in which the Solicitor General is stated to have said that justice was not duly administered in the House of Lords. On the occasion of the House sitting for appeals, after the Lord Chancellor had delivered judgment, and before their Lordships had taken upon themselves their legislative capacity, Lord St. Leonards, addressing himself as much to counsel at the bar, as to the two or three lay peers present, complained of certain remarks recently made by Sir R. Bethell in the House of Commons, impugning the mode in which appeals were conducted in the House of Peers, which he had said could hardly be paralleled in any of the inferior tribunals. The Solicitor-General had com-

plained that frequently only two law Lords (the Lord Chancellor and the Lord St. Leonards) were present, and that one of these peers went out of the house and returned without attending to the argument of counsel, and considered himself privileged to listen or not, as if he were present at a debate. Lord St. Leonards warmly denied the accuracy of these statements, declared that he gave the most conscientious attention to everything that was said by counsel, and that if he left the house for a few minutes he took care to consult an accurate report of what had been said during his absence. Lord Campbell followed, and spoke very strongly against the Solicitor-General for endeavouring to shake public confidence in the administration of justice in that house. He said he considered that he had made an attack upon the Lord Chancellor, and it seemed as if he were of opinion that justice would never be properly administered in the House of Lords until he (the Solicitor-General) sat upon the woolsack. The Lord Chancellor said his hon. and learned friend had a right, if he chose, to impugn the system of hearing appeals in the House of Lords; but he had made a most unfounded attack upon himself and Lord St. Leonards. The Lord Chancellor defended, at some length and with much warmth, the course taken by Lord St. Leonards and himself. When only two laws lords sit in appeal cases, and they differ in opinion, the judgment of the court below is affirmed. The Lord Chancellor admitted that this was not very satisfactory to the suitor, who might suppose that if another law lord had been present the judgment of the inferior tribunal would have been reversed. Lord Campbell's words are reported to have been as follows: "I have heard with indignation the language which had been attributed to her Majesty's Solicitor-General. An attack had been made on the constituted institutions of the country, and on a public functionary, the noble and learned lord on the woolsack, which I consider wholly unjustifiable." And the Lord Chancellor said that he felt it most important that the dignity of their Lordships' House as a Court of Appeal should be fully maintained. He did not consider the attack one so much upon himself as upon the mode in which justice was administered. The nature of the attack divides itself into two heads, the one on the efficiency of the tribunal, the other as regards the manner in which that tribunal has performed its duties whether well or ill. The former point he considered open to legitimate discussion, but the justice of the latter he entirely denied. It had been said that the law lords did not think it necessary to hear the whole of the case, and yet thought themselves quite competent to decide upon its merits. Now this assertion he again most emphatically denied; and he believed he should be wanting in his duty if he hesitated to express his

entire disapprobation of the language which had been attributed to the Solicitor-General. Here, for the present, the matter rests, but it is not improbable that hereafter the matter will have some important consequences.

COUNTY COURTS.—A return, published on the motion of Mr. Fitzroy, M. P., shows that from the establishment of County Courts in March, 1847, to the 31st of December, 1854, the total number of complaints entered was 3,576,207; the total number of causes tried (or in which judgment was entered), 1,986,872; the total number of cases tried above £20 and under £50, 28,268; the total number of days on which the courts have sat, 65,156; the total amount of the moneys for which the complaints were entered £11,312,298; the total amount for which judgment has been obtained, £5,856,084; the total amount of moneys paid into court in satisfaction of debts sued for, without proceeding to judgment, £771,158; the gross total amount of fees received (whether for home or foreign courts), £2,097,343, including £646,125 for the judges fund, £643,229, for clerks fees, £453,744, for bailiffs' fees, and £354,245, for the general fund. The gross total amount of moneys received to the credit of suitors was £2,992,073, and the amount paid out to them £2,439,072. The total number of causes tried by jury was 6,508, in 3,807 of which the party requiring a jury got a verdict. The total number of complaints entered and tried from August 14, 1850, to December 31, 1853, by consent of parties, under the 17th section of the act of the 13th and 14th of the Victoria, chap. 61, was 132 and 92 respectively. The total number of appeals during the same period was 105, the decisions of the court below having been affirmed in 34 cases and reversed in 29; 42 were dropped. The amount received of Her Majesty's Paymaster General by the Treasurers of Counties in 1854 was £34,050; and the amount paid to the said Paymaster-General, £12,000. In the year 1854, it appears that in the 60 circuits, 526,718 complaints were entered. The total number between £20 and £50 amounted to 9,395; the total number of causes tried to 282,220; and the total number of causes between £20 and £50 tried to 5,300; the number of days on which the courts sat to 8,643; and the total number of sittings held before a deputy judge to 640; the total amount of moneys for which the complaints were entered was £1,544,650; the total amount exclusive of costs, for which judgments were obtained, £751,099, and the amount of the costs £185,410; the total amount of moneys paid into court £111,207; the gross total amount of fees received, 271,079; the total amount received to the credit of suitors, £607,824; and the amount paid out to them, £601,105; the total number of causes tried by jury 715, in 362 of which causes verdicts were obtained by the party demanding the jury; the total number of executions issued by the clerk of the court against goods and defendants, 72,590; the total number of judgment summonses issued, 56,046; the total number of judgment summonses heard by the court, 28,781; the total number of warrants of commitment issued, 14,211; and the total number of persons actually incarcerated in debtors' dungeons under such warrants 5,977.

RECENT STATUTES, 18 & 19 VICTORIA.

(Continued from p. 26).

CAP. XX.—*Increased income tax.*—By this act an additional rate of 2d. in the pound on income tax is to be charged from the 5th April, 1855, until peace is proclaimed, and all relief, abatement, and deduction given or allowed by the former acts are to extend to this act.

CAP. XXVI.—*Altering forms of pleadings.*—This act continues for five years the powers given by the 13 & 14 Vic. c. 16, to the judges of the superior courts of common law to make such alterations in the pleadings and proceedings in such courts, and as to the payment of costs, as to them may seem expedient.

CAP. XXXIII.—*Grants of lands for religious purposes.*—This is an act of some importance to Irish lawyers, being passed to facilitate grants of lands and tenements for the purpose of religious worship and other purposes connected therewith. Sec. 1 contains an interpretation of terms, and sec. 2 provides that in citing the act it shall be sufficient designation to use the expression "The leasing Powers Act for Religious Purposes in (Ireland) 1855." By sec. 3 power is granted to make leases of lands in Ireland of not more than five acres for religious purposes.

CAP. XXXV.—*Abatement of income tax on assurances on lives.*—By this act, persons having made insurances with friendly societies legally established under act of Parliament are entitled to the benefits and advantages of the 16 & 17 Vic. c. 91. By sec. 2 the provisions of the 16 & 17 Vic. c. 91 are continued in force until the 5th of July, 1856.

CAP. XLI.—*Jurisdiction of ecclesiastical courts in cases of defamation abolished.*—This is a short statute, and though not affecting any great interests yet of some importance as a beginning of the threatened transfer of ecclesiastical jurisdiction. It recites that "Whereas the jurisdiction of the ecclesiastical courts in suits for defamation has ceased to be the means of enforcing the spiritual discipline of the church, and has become grievous and oppressive to the subjects of this realm: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Jurisdiction of ecclesiastical courts in England, &c., in suits of defamation abolished.*—From and after the passing of this act it shall not be lawful for any ecclesiastical court in England or Wales to entertain or adjudicate upon any suit for or cause of defamation, any statute law, canon, custom, or usage to the contrary notwithstanding.

2. *Persons in custody for defamation under order of ecclesiastical courts to be discharged, but such order not to be made until costs are paid.*—In the case of every person committed to gaol before the passing of this act under any writ *de contumace capiendo*, issued in consequence of any proceedings before any ecclesiastical court, in any cause or suit for defamation of character, the judge of the ecclesiastical court before whom such proceedings shall have been had shall make an order upon the officer in whose custody such person is for discharging such person out of custody, and such officer shall, on the receipt of such order, forthwith discharge such person; and it shall not be necessary for such person to take any oath of future obedience to his or her ordinary: provided always, that such order shall not be made unless the costs lawfully incurred in any such suit shall have been previously paid into the registry of such ecclesiastical court, or unless the person against whom such costs shall have been decreed shall have already suffered imprisonment for one month in consequence of non-payment thereof."

CAP. XLII.—*British ambassadors and vice-consuls enabled to take oaths and do notarial acts.*—This act confers similar powers on ambassadors and other diplomatic agents and vice-consuls and consular agents abroad to those which are by the 6 Geo. 4, c. 87, conferred on British consuls general and consuls. Sec. 1 is the principal clause in the act, which is, however, followed up by sec. 2, enacting that affidavits and affirmations taken under sec. 2 may be used in the courts of the United Kingdom, and by sec. 3, which provides for admission of documents sealed or signed by such functionaries.

1. *Oaths may be administered by ambassadors and other British ministers abroad.*—From and after the passing of this act it shall and may be lawful for every British ambassador, envoy, minister, chargé d'affaires, or secretary of embassy or of legation exercising his functions in any foreign country, and for every British vice-consul, acting consul, pro-consul, or consular agent (as well as every consul general or consul) exercising his functions in any foreign place, whenever he shall be thereto required, and whenever he shall see necessary, to administer in such foreign country or place any oath, or to take any affidavit or affirmation, from any person whosoever, and also to do and perform in such foreign country or place all and every notarial acts or act which any notary public could or might be required and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had or done by or before such ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, vice-

consul, acting consul, pro-consul, or consular agent, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if such oath, affidavit, or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had or done before any justice of the peace or notary public in any part of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature.

3. *Documents to be admitted in evidence without proof of the signature or seal of the ambassador or other official person.*—Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal or signature of any British ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, consul general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any such oath, affidavit, affirmation, or act having been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence, without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person.

CAP. XLIII.—*Settlements binding on infants.*—This act purports to remedy the inconveniences and disadvantages so well known to exist of persons who marry under age being incapable of making binding settlements, but the act does not apply to male infants under twenty, and female infants under seventeen, and the sanction of the Court of Chancery is requisite. As the act will be of some practical importance, and is short, we give its enactments entire.

1. *Infants may, with the approbation of the Court of Chancery, make valid settlements or contracts for settlements of their real and personal estate upon marriage.*—From and after the passing of this act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant with the approbation of the said court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

2. *In case infant die under age appointment, &c., to be void.*—Provided always that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

3. *The sanction of the Court of Chancery to be given upon petition.*—The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition presented by the infant, or his or her guardian, in a summary way, without the institution of a suit; and if there be no guardian, the court may require a guardian to be appointed or not, as it shall think fit; and the court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

4. *Not to apply to males under twenty, or females under seventeen years of age.*—Provided always, that nothing in this act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years.

CAP. LXIII.—*Friendly Societies Amendment Act.*—This act which came into operation on the 1st of August last, is one for consolidating and amending the laws relating to friendly societies, and by it all the previous acts relating to these societies are repealed, except as to subsisting societies, though nearly the whole of the sections are made applicable to such societies.

Friendly societies can only in future be established:

1. For insuring a sum of money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the wife or child of a member.

2. For the relief or maintenance of the members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood, or the endowment of members or nominees of members at any age.

3. For any purposes which shall be authorised by one of Her Majesty's principal Secretaries of State—or in Scotland by the Lord Advocate—as a purpose to which the powers and facilities of the act ought to be extended; and the sum to be assured on any contingency is increased to £200, but no annuity is to exceed £30 per annum.

No money is to be paid for the funeral expenses of a child, except upon production of a copy of the entry in the register of deaths; and if such entry shall not state that the cause of death has been certified by a qualified medical practitioner, then a certificate signed by a qualified medical practitioner, stating the probable cause of death, shall be re-

quired: the sum payable for the funeral expenses of a child under five is not to exceed five pounds, and of a child between five and ten is not to exceed ten pounds.

By section 16, the trustees of a friendly society may purchase, build, hire, or take on lease any building for the purpose of holding the meetings of the society.

By sect. 24 a remedy is given by application to justices against any officer, &c., who shall wilfully apply any part of the funds to purposes other than those expressed or directed in the rules.

A provision is made against circulating copies of rules or alterations, as being certified by the registrar, when they have not been so certified.

By sec. 32, further facilities than those in the former acts of investing the funds of a friendly society are given, as well as by sec. 33 extended powers to the registrar to order the transfer of stock and money in savings banks, when a trustee is absent from England, &c., or has been removed from office, &c.

With respect to the settlement of disputes, considerable alteration has been made in the law. The rules may direct the manner in which disputes between a member or person claiming on account of a member, or under the rules, shall be decided; and the mode of enforcing the decision of the arbitrators, or of deciding disputes, if no award is made; &c., is by application to the county court; and after the 1st August next the power of justices to decide disputes under rules which referred the decision to them is taken away, and such disputes must be referred to and decided by the county court.

By sec. 45, every society already or hereafter established is once in every year, in the month of January, February, or March, to transmit to the registrar a general statement of the funds and effects of such society during the past twelve months, or a copy of their last annual report. This provision supersedes the necessity of the annual return, required under the repealed acts, being sent to the registrar.

In the case of a member in the militia, serving out of the United Kingdom, the society have power in certain cases to demand an extra contribution during such service (sec. 47).

From the 1st of last August there are no fees payable to the registrar for his certificate to rules or alterations.

CAP. LXVII.—*Facilitating remedies on bills of exchange.*—We have noticed this act elsewhere at length on account of its great practical importance.

SUMMARY REMEDIES ON BILLS OF EXCHANGE.

We have frequently called attention to the important bills (for there were originally two), for facilitating, or rather superseding, proceedings on bills of exchange. The most sweeping of the two measures has been defeated, but not without a fearful howl by Lord Brougham, and a threat on his part to renew at some future time his exertions to get the legislature to adopt his favourite clauses. The author of the other and successful bill was Mr. Keating, but the measure underwent great alterations in committee ere it was allowed to become an act. The time fixed for the act coming into operation is the 24th of October next, which will afford a little opportunity for a study of its provisions. The remedy given by the act is confined to bills and notes, which have become due within six months prior to proceedings being commenced. It provides that after the 24th of October next, all actions on bills or notes commenced within six months after the same shall have become due and payable may be by writ of summons in the special form prescribed in the schedule. On affidavit of personal service, or an order for leave to proceed, as provided by the C. L. P. A. 1852, in case the defendant shall not have obtained leave to appear and have appeared, the plaintiff may sign judgment for the sum indorsed on the writ, with interest at the rate specified, to the date of the judgment, and a sum for costs to be fixed by the masters of the Superior Courts, unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may, on such judgment, issue execution forthwith. Twelve days are allowed to defendant to appear and defend the action. But he can only do so, either by paying into court the sum indorsed upon the writ, or by leave of a judge on affidavits disclosing a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms, as to security or otherwise, as to the judge may seem fit. And for the further protection of defendants against surprise, the 3rd section empowers the court or a judge, even after judgment, upon special circumstances, to set aside the judgment, or to stay or set aside execution and to give leave to defend the action. Section 6 empowers the holder of a bill or note to issue one writ of summons against all or any number of the parties to such bill or note, such summons to be the commencement of an action or actions against all or any of them. The expenses incurred in noting are to be recoverable. The court or judge is empowered, in any proceeding under the act, to

order the bill or note sought to be proceeded upon to be deposited with the officer of the court, and further to order proceedings to be stayed until plaintiff shall have given security for costs. The act is to apply to the Palatine Courts. It is not, however, applicable in the county courts; but the Queen in council may at any time order that it shall be extended to all or any of the Courts of Record, which order, we presume, will be made as soon as there has been a short experience of its working.

As this statute must be studied, both by the practitioner and the student, we give it in *extenso*.

1. *October 24, 1855, all actions upon bills of exchange, &c., may be by writ of summons as form in schedule A; plaintiff, on filing affidavit of personal service, may at once sign final judgment, as form in schedule B.*—From and after the twenty-fourth day of October one thousand eight hundred and fifty-five, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable may be by writ of summons in the special form contained in schedule A. to this act annexed, and indorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the court, or an order for leave to proceed, as provided by the Common Law Procedure Act 1852, and a copy of the writ of summons and the indorsements thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in schedule B. to this act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum indorsed on the writ, together with interest, at the rate specified (if any), to the date of the judgment, and a sum for costs to be fixed by the masters of the superior courts or any three of them, subject to the approval of the judges thereof or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith.

2. *Defendant showing a defence upon the merits to have leave to appear.*—A judge of any of the said courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavit satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on

such terms as to security or otherwise as to the judge may seem fit.

3. *Judge may, under special circumstances, set aside judgment.*—After judgment, the court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just.

4. *Judge may order bill to be deposited with officer of court in certain cases.*—In any proceedings under this act it shall be competent to the court or a judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof.

5. *Remedy for the recovery of expenses of noting for non-acceptance of dishonoured bill.*—The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or nonpayment, or otherwise, by reason of such dishonour, as he has under this act for the recovery of the amount of such bill or note.

6. *Holder of bill of exchange, may issue one summons against all or any of the parties to the bill.*—The holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued.

7. *Common Law Procedure Acts and rules incorporated with this act.*—The provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all the rules made under or by virtue of either of the said acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this act.

8. *Act to apply to Court of Common Pleas, Lancaster, and Durham.*—The provisions of this act shall apply, as near as may be, to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham, and the judges of such courts, being judges of one of the superior courts of common law at Westminster, shall have power to frame all rules and processes necessary thereto.

9. *Her Majesty may direct act to apply to courts of record in England and Wales.*—It shall be lawful for

her Majesty from time to time, by an order in council, to direct that all or any part of the provisions of this act shall apply to all or any court or courts of record in England and Wales, and within one month after such order shall have been made and published in the *London Gazette* such provisions shall extend and apply in manner directed by such order, and any such order may be, in like manner, from time to time altered and annulled; and in and by any such order her Majesty may direct by whom any powers or duties incident to the provisions applied under this act shall and may be exercised with respect to matters in such court or courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such court or courts the provisions so applied.

10. *Extent of act.*—Nothing in this act shall extend to Ireland or Scotland.

11. *Short title.*—In citing this act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Summary Procedure on Bills of Exchange Act, 1855."

SCHEDULES referred to in the foregoing act.

A.

Victoria by the Grace of God, &c.,

To C. D., of , in the county of

We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the judges of the courts at Westminster to appear, and do within that time appear in our court of in an action at the suit of A. B., the said A. B. may proceed to judgment and execution.

Witness, &c.

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within six calendar months from the date hereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before the service thereof.

This writ was issued by E. F., of , attorney for the plaintiff. Or, this writ was issued in person by A. B., who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence].

Indorsement.

The plaintiff claims [pounds principal and interest], or, pounds balance of principal and interest due to him as the payee [or, indorsee] of a bill of exchange or promissory note, of which the following is a copy:—

[Here copy bill of exchange or promissory note, and all indorsements upon it].

And if the amount thereof be paid to the plaintiff or his attorney within days from the service hereof further proceedings will be stayed.

NOTICE.

Take notice, that if the defendant do not obtain leave of one of the judges of the courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days, to sign final judgment for any sum not exceeding the sum above claimed, and the sum of pounds for costs, and issue execution for the same.

Leave to appear may be obtained on application at the judges' chambers, Serjeant's-inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after service thereof.

This writ was served by X. Y. on L. M. (the defendant the defendants), on Monday the of , 18

By X. Y.

B.

In the Queen's Bench.

On the day of , in the year of our Lord, 18 [day of signing judgment].

England (to wit). A. B., in his own person [or by his attorney] sued out a writ against C. D., indorsed as follows:—

[Here copy indorsement of plaintiff's claim].

and the said C. D. has not appeared:

Therefore it is considered that the said A. B. recover against the said C. D. pounds, together with pounds for costs of suit.

STUDY OF CONVEYANCING.

We have before (vol. i, p. 396—400) furnished some general observations on the study of conveyancing, and we now follow them up by some more practical remarks, which will, we trust, be found as useful to the solicitor as to the articulated clerk. It is too often thought by the practitioner that having passed through his probationary course of study, he is absolved from the study of the principles or grounds of the law. It is true that he ought to have some considerable acquaintance therewith, but it is to be feared that with very many this is not the case. But whether it be so or not, he will find his advan-

tage in recurring, amidst the practical labours of the profession, to some of its principles.

Subject of conveyancing.—The subject with which conveyancing has to deal is "Property,"—in other words, those things which are susceptible of ownership or dominion,—their enjoyment,—transfer by act of law and act of the party,—by instrument *inter vivos*, and by will,—their pledge and settlement,—and the various rights and obligations thence arising, including the bar or extinguishment of rights or titles to property by inconsistent possession and non-claim, under what are termed "the Statutes of Limitation," and the construction of written documents.

Classes of property—Land.—Property, by law, has been distributed into distinct classes. With reference to the principles of classification, it cannot fail to be observed, that there is one subject of property,—that is to say "Land,"—which, by certain attributes or peculiarities, is distinguished, essentially, from all others.

Those characteristics are its immovability and its indestructibility or permanence. To these may be added, its capacity of continuous identification to an extent of which other descriptions of property do not admit.

Movable and immovable property.—The most obvious, and most natural, division of property would seem, therefore, to be one based upon the attributes alluded to; and accordingly, the earliest classification appears to have been that which distributed property into two kinds,—that is to say, into "movable" and "immovable"; and although those terms have, in later times, been replaced by others, they still lie at the root of modern classification.

Real and personal property.—At this day the grand and primary division of property, according to legal and technical phraseology, is into "real" and "personal."

This classification had its origin rather in the nature of the procedure by which rights and obligations connected with, or arising out of, disputed and conflicting claims to the ownership of property, were put in train for adjudication than to any intrinsic characteristics of the subject itself:—but, under one or other of those divisions, every description of property will be found to range itself.

Mixed property.—By analogy; probably, to the technical division of actions or remedies into real, personal, and mixed, expressions are sometimes to be met with, which may seem to imply a threefold division of property. We allude to the phrase "property real, personal, and mixed." The expression "mixed property" or "mixed estate" is however, rather a popular, than a technical or scientific one.

It is sometimes, and, indeed, not unsuitably, applied to those subjects which, though clearly comprehended within one or other of the grand divisions already mentioned, viz., "real and personal," partake of the nature of each.

Title-deeds.—For instance, the title-deeds to land held for an estate of inheritance are sometimes referred to as "mixed property"—as being, in themselves, movables or chattels, but being, in respect of their mode of transmission (as accessories to the land) in the nature of realty.

Charitable dispositions.—So the term "mixed estate" is not unfrequently applied to that description of property which, within the Statute of the 9 Geo. 2, c. 36 (commonly but inaccurately termed the Mortmain Act), constitutes an interest in land so as to be incapable of testamentary disposition for a charitable purpose—such as money secured by mortgage or charge upon land, unpaid purchase-money, for which a vendor of land may retain an equitable lien upon the land sold, in contra-distinction to what is termed "pure personality."

Personal annuity.—So, upon the same principle, a perpetual personal annuity (as distinguished from a rent-charge which is real estate), that is to say, a yearly sum, the payment of which is secured to B, and his heirs for ever by the bond or covenant of A, binding his heirs, is sometimes termed "mixed property," being, as to the subject, money or personal estate, and as respected its transmissibility, an hereditament, devolving by heritable succession to the real representative.

Terms for years.—Indeed, the term "mixed estate" might not inaptly be further extended, so as to denote land held for a term of years, that being on the one hand, as respects the subject, land or realty, and on the other, as to the interest in that subject, a chattel interest, or personality, as afterwards more particularly explained and illustrated.

Real and personal estate.—The term "mixed estate" is however, as already observed, one rather of a popular than of a technical or scientific character, and, for all practical purposes, it will suffice to adhere to the twofold division of property already mentioned,—that is to say, "realty and personality," or "real estate" and "personal estate,"—and afterwards to distribute the two grand and primary classes into such subordinate divisions as may be necessary for the more apt and convenient illustration of particular rules or principles of law.

Real and personal estate defined.—Viewing, then "property" as divided into—firstly, "real estate;" secondly, "personal estate;" how are the two classes to be distinguished or defined? It is difficult, if not impossible, to give, within a reasonable compass of words, a definition which should express

the essential, or even the leading, characteristics of each or of either.

Land and its adjuncts.—Text writers commonly defined or explained the terms by reference to some leading attribute of the subject or thing, as being, for instance, movable or immovable. Land and its adjuncts, as being immovable, fixed, permanent, enduring—constituting “real property.”

Money, furniture, &c.—Money, money in the funds, furniture, debts, cattle, and timber, and agricultural produce, when severed, as being movable, fluctuating, perishable—constituting “personal estate” or “personalty.”

Terms for years—Annuities.—These, however, are perhaps, rather of the nature of illustrations or examples, than of definitions, and they are imperfect, inasmuch as, on the one hand, there are certain interests in the fixed and immovable subject land, which are in law “personal estate,” such as a leasehold interest, commonly called “a term of years,” already noticed; and, on the other hand, there is the instance of the perpetual periodical money payment, not issuing out of land, which is a heritable subject, as already also noticed.

Ownership to be considered.—It is, however, essential to be able to distinguish accurately, one class of property from the other, each being regulated by its own particular system of jurisprudence; and it will be found in the sequel that to effect this discrimination regard must be had, not only to the subject or thing itself, but also to the nature and extent or degree of the ownership or interest in such subject or thing.

The devolution of property on death of owner.—Independently of certain distinctions and peculiarities in the mode of transfer, *inter vivos*, between the two species of property,—and independently, also, of a remarkable distinction which, until a comparatively recent period, existed between one and the other, in the mode of testamentary or posthumous disposition,—and independently, further, of certain distinctions between the two in respect of the order and extent of their liability to satisfy the debts and obligations of owners, and more especially of deceased owners,—the characteristic and essential distinction between the two species of property seems to consist in this, that on the death of the owner intestate, that is to say, without having made an effectual testamentary disposition, there occurs a separation or division of title and ownership. The two flow in separate and distinct channels,—the real estate devolving upon the “heir” or real representative, by the act or operation of law termed “descent,” which implies an heritable quality; and the personalty vesting, not technically by “descent,” but by what may be termed “transmission” in the

personal representative, that is to say, in the “executor,” if by his will the owner has appointed one who accepts the office, and if not, in a functionary denominated the “administrator,” constituted by the act of the Ecclesiastical Court.

Real estate defined.—Real estate may, therefore, be defined to be that which on the death of an intestate owner vests by descent, or heritable succession in his heir-at-law, or real representative.

Personal estate defined.—Personal estate, that which on the death of the owner, whether testate or intestate, vests at law, in, or is transmitted to his personal representative, being either an executor or administrator, as already explained.

Difference between devise of real and personal estate—Assent.—And there is this further observable difference between real and personal estate, that if the former be devised by the will of the owner to a party not being his heir-at-law, the devisee takes the subject of the gift immediately and at once, on the decease of the testator, *by force of the will itself* and not in any sense through or under the heir, or by virtue of any assent by him. Whereas in the case of a testamentary disposition of personal estate (technically termed “a bequest”), whether specific or general, particular or residuary, the law in the first instance uniformly vests the subject of the gift in the executor; and in order to divest this legal title from him and effect its transfer to the legatee, a further act is necessary, viz., the assent of the executor to the legacy or bequest, until which assent, either expressly and formally given, or presumed or implied from circumstances, the legal right and title to the subject of the gift remains in the executor, commonly termed “the legal personal representative.”

Whilst, therefore, it is a positive rule of law that the personal estate of a deceased owner, however given by his will, vests, in the first instance, on his decease, in his legal personal representative (executor or administrator—as the case may be), and so remains until his title is shifted, either by sale or other disposition, or by assent to the bequest, there is no analogous rule or principle application to real estate as between heir and devisee.

Reason for assent in cases of legacies.—This peculiar rule, in respect to the transmission of the personal estate of a deceased owner flows from another rule or principle of law which imposes upon the legal personal representative (as distinguished from the legatee or beneficiary) the obligation of discharging, to the extent of the personal estate of the deceased (technically termed his “assets”), all debts and demands outstanding against him, a duty which could not be adequately fulfilled, unless the title to and control over, such personal estate was vested in

the executor or administrator, and the right of the legatee was held to be subordinate to such title and control.

Personal representative successor to personalty.—As regards *personal estate* therefore the executor or administrator, as the case may be, is regarded in law as the universal successor in the first instance.

Real estate held by title.—Real estate was further distinguished from personalty in general by the circumstance of its being held by title.

Possession of personal goods implies ownership.—In cases of mere personalty, not being chattel interest in land, the fact of possession alone ordinarily implies an absolute ownership. On the purchase, for instance, of cattle, furniture, or other personal chattels, no inquiry is usually made (nor is it in general necessary that it should be) into the title of the party assuming to sell.

Sixty years title to real estate.—Whereas on the sale of real estate no prudent purchaser omits, to investigate the title-deed of the seller for a period of something like sixty years retrospectively from the time of the sale, requiring for that purpose, the title to be formally deduced and verified by documentary and other evidence.

Possession of lands does not imply ownership.—The necessity for this is obvious when it is considered that the mere fact of the possession of land does not import an absolute title to, or ownership of, the fee simple and inheritance in such land.

Possession of lands implies tenancy.—In the majority of instances, the interest of the individual actually in possession is merely that of a tenancy for years or from year to year; and where that is not the case, the owner may be mere tenant for life or in tail, or may be a husband seised in right of his wife, or as tenant by the curtesy; and as parties so circumstanced can not transfer to a purchaser a greater extent of ownership than that which they possess, the risk which a purchaser would incur in completing his purchase without investigating the title of the seller is at once obvious; and the necessity for such an investigation of title on behalf of a mortgagee, upon advancing money upon landed security, is still more cogent, as a mortgagee, unlike a purchaser, does not, at least in the first instance, enter into possession or receipt of the rents of the land.

Lands, tenements, and hereditaments.—In legal phraseology, real estate comprehends lands, tenements, and hereditaments.

Land.—According to its strict legal import, when used in instruments of record and in the pleadings in real actions under the old system, the term "land" signified arable ground only. Thus, in fines and common recoveries, a distinction was

always taken between "land" as signifying "arable land" and other descriptions of land, the language being so many acres of land, so many acres of meadow, so many acres of pasture, so many acres of wood, &c.; but, in its ordinary legal signification, the term "land" comprehends, not only every description of ground or soil, whatever may be the particular nature or mode of cultivation, but also everything attached to it, such as houses, trees, &c., as well as everything lying beneath its surface, such as mines and minerals.

This is the construction of the term in deeds and wills, unless there is something in the context to modify or control it; and therefore it cannot be doubted but that a conveyance or devise of all a man's land in *A.* would comprehend and pass the whole of his lands there, though they should consist of arable, meadow, pasture, and wood land.

But though this is the general rule, the meaning of the term "land" might of course, be qualified or restricted by the context of the instrument: for instance, if a testator, having lands and houses in the parish of Dale, should devise all his *lands* in Dale to *A.*, and all his *houses* in Dale to *B.*, there it would obviously contravene the intention of the testator that the word "lands" should comprehend and pass houses, and hence it would, in construction, be interpreted in a limited sense.

So similar instances might be put as to mines, timber, &c. This leads to the remark, that laxity or want of precision in this description of parcels in deeds and wills cannot be too cautiously avoided. A glance at the published reports will show the amount of litigation which has been occasioned by want of attention to this particular.

Tenement.—"The word "tenement" is of more comprehensive import than the word "land." It is however, difficult to affirm that it has any very precise technical meaning. In popular language, and in relation, more especially, to copyhold "property," it is very generally used as synonymous with "habitable building," but, in its legal signification, it would seem to comprehend not only "land" in its literal sense, but every subject of realty which may be affirmed to lie in tenure, or to be the subject of feudal holding. Some text writers, indeed, used the term in a still more extensive sense, as including, not only land, or subjects lying in tenure, but every modification of right accruing from, or arising out of, land to which the law attributed a substantive, though incorporeal, existence.

And that the meaning of the term is not restricted, in legal construction either to land or to subjects susceptible of the feudal holding, is clear from this circumstance, that it was the only term used in the Statute *de donis conditionalibus* as descriptive of

those subjects in which an estate tail could be created or limited, and that estate is indisputably applicable, not only to lands or corporeal hereditaments, but to those of an incorporeal quality, such as rents, tithes, advowsons, &c., that is to say, to subjects not lying in tenure.

Tenures and feuds.—The mention of tenure and the feudal system suggests the propriety of explaining some few, at least, of the leading features of that system, forming, as it does, the groundwork of much of the Law of Real Property in this country. The system of feuds, according to the views of the best historical writers, took its rise with those warlike but semi-barbarous northern tribes, who, on the fall of the Roman empire over-ran the greater portion of Europe. It was a part, and indeed the main part, of that machinery by which the individuals of an entire military tribe were mutually linked and bound, under ties of reciprocal interest, for the maintenance and efficient defence of a district or country acquired by conquest. The sovereign or leader of the victorious army in the exultation of success, and partly as a reward, partly as a stimulus, to his followers, allotted large portions of the conquered territory to his military officers of the highest rank, and portions of such allotments were by them dealt out in smaller parcels to their subordinates, and so through a successive series. The allotments or grants of land thus made were denominated *feoda*, that is to say feuds or fees.

Holdings by military service—Mesne lords.—These donations, however, were not voluntary or gratuitous: they were made expressly to hold of the donor by the performance of military duties, as the essential condition of their enjoyment, and on failure of the performance of which they became subject to resumption by the grantor. As the whole emanated, originally, from the sovereign or chief, he stood in the position of lord paramount, or supreme head, and as such retained the ultimate property in every portion of the soil; the grantees of the sovereign or chief, as between themselves and their subordinate grantees, were termed *mesne* or intermediate lords.

Gradual increase of tenants interest—Heirs.—In the earlier period of the system, feuds appeared to have been granted at the will of the lord only, afterwards for life, and eventually they became hereditary; and it seemed to have been an established rule, that unless express mention was made of the heir or heirs of the body of the grantee the interest under the grant terminated with the life of the grantee.

Conquest grants on military service.—One of the consequences of the Norman conquest was the confiscation by the conqueror of the greater portion of the lands of this kingdom. These were granted out

by him to his followers, and by them to their inferiors, in accordance with the principles of the feudal system: and subject, therefore, to the performance of certain military services, and to an obligation on the part of the grantee to take, whenever required so to do, an oath to be faithful to his lord, or, in the language of the time, to do fealty to him.

Socage tenure.—But although it was the habit of the chief who received a grant of land immediately from his sovereign to appropriate the larger portion of it to his military followers or retainers to be held by the tenure which at that period, appeared alone to have been regarded as a tenure of honour, that is to say, by military service, yet other portions of the feud or fief were commonly allotted to a subordinate and non-military class, to be held by what was termed "*socage tenure*." The etymology as well as the precise meaning of this term "*socage*," was matter of controversy; perhaps the majority of writers interpreted the expression "*tenure by socage*" as meaning "*plough-service*."

Whatever may have been its precise signification, the tenure by *socage*, though less honourable than that of military service, is not a tenure of degradation. It is to that tenure that, by virtue of certain acts passed in the reign of Charles the 2nd, all the lands in this kingdom in the hands of private persons (except lands of customary or copyhold tenure) are reduced.

Demesne—Copyholds.—The residue of the land received by the chief from the bounty of his sovereign was retained as his own, in the language of the day, as his "*demesne*," and was cultivated by his serfs or villeins; from this class sprang the copyholders of this day; whilst freeholders had their origin in the two first-mentioned classes.

Manors and seignories.—It was under this system that manors or seignories derived their origin.

Sub-infeudations.—Until the reign of Edward the 1st, the owner or grantee of the feud or fief was competent to transfer the land to a stranger in fee simple, to hold of the party so making the grant in the same manner as he himself held of his immediate superior, and by similar services, so that a party then seized of lands might transfer to another his entire interest in such lands, and yet retain the feudal seignory, which, amongst other advantages, carried with it the right of escheat, that is to say, the right to resume possession of the lands on failure of the heirs of the grantee or tenant.

Manors defined.—It was the combination of this seignory with lands, parcel of the original subject of the grant, which in law constituted a manor. A manor consisted of *demesnes* and *services*, the former comprehending that portion of the land the absolute interest in which was never parted with by

the lord, and including the wastes and (if there were any) the copyholds within the manor; the latter, that is to say the services, consisting of the rents payable and the duties performable by the parties to whom, as freeholders, lands were conveyed in fee simple to hold of the lord making the grant, and including the right of escheat on failure of heirs of the tenant or grantee.

At the period, therefore of which we are speaking, every tenant in fee of lands, whether deriving his title immediately or mediately from the Crown, was competent to create a manor or seignory, to constitute himself by his own act a meane or intermediate lord, to hold his courts accordingly, and to secure to himself the right of escheat and the various other valuable fruits of tenure.

Statute of Quia Emptores—Sub-infeudations.—To prevent alienations of this description, technically termed "sub-infeudations," and the mischiefs and inconveniences to which they gave rise, a Statute was passed in the 18th year of the reign of King Edward the 1st (from the words with which it commences commonly called "The Statute of quia Emptores") which, after authorising every freeman to sell all or any of his lands at his own pleasure, enacted, that the alienee should hold the lands so sold of the same chief lord of the fee, and by the same, or a proportion of the same, services as his feoffor before held the same.

Creation of manors prohibited—"Tenendum."—The effect of this Statute was therefore, virtually, to prohibit, thenceforth, the creation of manors or seignories: inasmuch as a party conveying to another in fee simple was rendered incapable of sub-infeudating or reserving a tenure to himself. It was this statute which gave rise to the introduction of what was technically called "the tenendum" in conveyances of lands in fee simple, that was to say, to the words "To be holden of the chief lord or lords of the fee thereof by the rents and services therefore due and of right accustomed."

That clause, however, was never an essential part of the deed, inasmuch as it merely expressed, by way of echo, that which had been enacted by the statute as a positive rule of law; and in modern times, therefore, it has fallen altogether into disuse.

Manors, origin of.—From what had been stated, it necessarily followed that every legal manor existing in this country must have been created prior to the passing of the statute adverted to.

Land held of sovereign.—It will also be inferred that it is at this day a fundamental principle of real property law in this country, that all land is, by intentment, holden either immediately, or mediately, of the Crown.

Military service to be performed.—It is to be borne

in mind, that the system of feuds originated altogether in the military policy of the times, and that at the period, at least, of its establishment, the essential condition of the enjoyment of the fief by the tenant or grantee was the performance (and originally personal performance) of military duties or service.

From that there resulted certain rules and principles, flowing necessarily out of the system, at which it is necessary to glance before quitting the subject; as they still materially influenced the Law of Real Property in this country.

Livery of seisin—Abeysance.—Those are, firstly, the rule which required a public and formal delivery of the possession of the land on the transfer of the immediate freehold by the tenant to a stranger.

And secondly, that which prohibited the abeyance or suspense of the immediate freehold, or which, in other words, required the fief to be continuously represented and filled by a tenant or owner. That latter rule interdicted all such dispositions as involved vacancy of the possession or seisin.

Feoffment with livery of seisin.—The publicity or notoriety in the transfer of the feud or freehold which was required by the first of those rules was secured by the mode of conveyance termed a feoffment, the essence of which consisted in the open and formal delivery of the land by the alienor to the alienee in the presence of the other tenants of the manor. This delivery was usually symbolical, that is to say, by the delivery of a turf cut from the soil into the hands of the feoffee, in the presence of witnesses; the ceremony was denominated "livery of seisin." No written instrument was necessary to its efficiency, though, in course of time, it became usual to accompany the transfer by a written document, with a view to its more complete evidence.

The necessity for a writing, as an essential portion of the assurance, did not arise till the passing of the Statute of Frauds and Perjuries, in the 29th year of the reign of King Charles the 2nd.

Exchanges—Fines and recoveries.—With the exception of an exchange and certain instruments or proceedings of record in the King's Court, denominated fines and common recoveries, the feoffment appears to have been the universal assurance of the realm for transferring *inter vivos* the immediate estate of freehold in corporeal hereditaments as between private parties.

Upon an exchange, the element of publicity was secured by that rule of law which required that, to perfect an exchange, it should be accompanied or followed by the mutual entry of each party to the transaction upon the lands exchanged; and, as to fines and recoveries, those being transactions in solemn form in the courts of the sovereign or the

lord, were deemed to carry in themselves sufficient evidence of notoriety. This requisite of notoriety in the title and ownership of the feud, and publicity in its transfer or alienation, rendered invalid all attempts at limitations or substitutions which sought to shift the freehold ownership from the feoffee or tenant to a stranger otherwise than by a new feoffment with livery, or which sought to determine in favour of a stranger the ownership of the feoffee or tenant before it had completed its original measure or compass of duration.

Powers of appointment.—Hence, at the common law, there was an entire absence of powers of appointment over the freehold, and all analogous acts of dominion and limitations having for their object the interrupting, divesting, or displacing the ownership in favour of a stranger before it naturally terminated or expired, were also unknown.

Suspense or abeyance of the freehold.—As regards the second of the two rules adverted to, viz., that which prohibited the suspense or abeyance of the immediate estate of freehold, it was obviously a consequence of that rule that no feoffment or transfer of the freehold could be valid, unless it took immediate effect. Hence, therefore, a feoffment of land by A. to B., to hold or be enjoyed from Christmas next, was and is now simply void. Such a transfer could not be attempted without livery of seisin, in other words, without actual delivery of the possession of the land, and such actual and immediate delivery, the effect of which was to divest the feoffor, at once, of his interest in the land, implied the existence of a present and immediate recipient, and was therefore considered as wholly inconsistent with a postponed or deferred enjoyment by the feoffee. The common law, therefore, cut the knot of difficulty by holding the transfer to be simply nugatory, and thence the maxim that feoffments to commence or take effect in future were and as they still are void.

Future estates—Remainders.—It was upon the same principle, that of non-abeyance of the freehold, that validity was denied to all substitutions of the freehold of land which, as to the possession, were intended to be future or postponed, unless they were engrossed one upon another in one consecutive and unbroken series, each awaiting the natural and regular expiration of the one prior in order, and without a moment's interval to separate or disjoin the one from the other. In that rule is to be traced the origin of what are technically denominated "Remainders."

STANNARY LAW IN DEVONSHIRE.

An act of the last session (cap. 32) has amended and extended the jurisdiction of the Stannaries Court over Devonshire, and as some of its provisions are of general importance, we purpose here to notice them. The act provides that the jurisdiction of the court of the vice-warden shall henceforth be extended and exercised over the county of Devon, and over the mines and miners therein. It further enacts that the process of that court shall run in and be executable throughout the counties of Devon and Cornwall, and that the forms and customs of procedure, as now lawfully used and exercised in the Stannaries of Cornwall (subject nevertheless to such amendments and provisions as are contained in, or may be authorised by the act, and to all other lawful rules and orders of the court), shall henceforth be adopted, used, and enforced in and throughout the stannaries and county of Devon, and that the stannaries of the two counties shall be and become for the purposes of stannary jurisdiction one entire district. It is then further provided that the present and all future vice-wardens of the Stannaries shall be vice-wardens of the Stannaries of and for both counties, and shall have therein the like powers, privileges, authority, and jurisdiction over and in respect of mines and miners, and causes touching the same, in Devon as in Cornwall; and all miners and others interested in mines in Devon shall have the privilege to sue and be sued, at law and in equity, in the court of the vice-warden, and be amenable to that court and to the vice-warden, as well by reason of the person as of the cause in like cases, and for like causes in and for which the miners and others interested in mines in Cornwall now have such privilege, or are amenable to the court or vice-warden. There is, however, a proviso that the common law jurisdiction of the vice-warden, in respect of causes of action arising in Devon, shall not extend to, or be exercised in, the county of Devon, or to or over miners therein, excepting in causes and in respect of matters relating to mines, or the products thereof, or work connected therewith, or to the working or management thereof, or the supply of materials, money, or necessities, or performance of work or labour to, for, or in respect of such mines or works, or relating to the customs of mining or miners, or to shares or interests in any mine, or adventure in mines. The union of these two important mining counties of Cornwall and Devon under the jurisdiction of the Stannaries Court is an important feature in modern legislation. It would be highly prudent, also, in those who are interested in mining adventures in those two shires, and who are resident in London and elsewhere in England and Wales,

beyond the limits of the jurisdiction, to remember that peculiar facilities are afforded by the present act for service of its process, and for rendering parties amenable to its orders and decrees. In fact, the vice-warden of the Stannaries will henceforth be enabled to exercise complete jurisdiction over parties, no matter in what part of England or Wales they may be resident, in respect of all questions relating to mining occurring within the precincts of his now extended limits. Such powers cannot fail to afford stability to mining operations in these rich mineral districts, and the present statute amounts to a legislative declaration that the Stannaries jurisdiction, even in its hitherto restricted form, has worked beneficially, and that its extension would be judicious and useful. By a notice, dated at Truro, on the 10th July, 1855, and signed P. P. Smith, secretary to the vice-warden, it is intimated to the public that until provisions shall be made for the sitting of the Stannaries Court in Devonshire, all suits and causes on the equity side of the court, arising within the Stannaries and county of Devon, must be prosecuted in the office of the registrar of the court at Truro, and heard and tried before the vice-warden at the Prince's Hall, in that town. Notice is thereby further given that all petitions must be entered at the office of the secretary of the vice-warden, and that summonses to appear and plead may be obtained from him. A further public intimation is thereby given, that generally all rules of practice, forms and customs of procedure now in force in the Stannaries of Cornwall, will be applicable (*mutatis mutandis*), changing only what ought to be changed, to causes arising in the Stannaries and county of Devon, save only that no proceedings can at present be effectually taken in respect of such last-mentioned causes on the common law side of the court, which involve the trial of any issue or question of fact triable by a jury. The reason of this latter reservation is obvious, as a trial by jury implies at common law a selection of jurors from the locality, and there cannot of course be any such selection until the court is itself enabled to hold its periodical sittings in the county of Devon.

NOTES OF LEADING CASES.

Limitations, statute—Cestui que trust and trustee—Tenancy at will—3 & 4 Will. 4, c. 27 [*Melling v. Leake*, Week. Rep. 1854-5, p. 759; 1 Jur. N. S. 759].—In this case a most important point was raised and decided on the operation of the Statute of Limitations on persons standing in the relative positions of trustees and cestuis que trust, and in which the distinction pointed out in *Watkins' Conv.* (p. 19,

by *Morley and Coote*), that the doctrine of a cestui que trust in possession, with the consent or acquiescence of the trustee, is to be regarded as the latter's tenant at will, applies only where the cestui que trust is the actual occupant, and not where he is merely allowed to receive the rents or otherwise deal with the estate in the hands of the occupying tenants, for in such cases the cestui que trust is merely the agent of the trustees. By sec. 2 of the Limitation Act, no person can make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right shall have first accrued. By sec. 3, where the person claiming such land or rent, or some person through whom he claims, shall have been in possession or in receipt of the profits of the land or the rent, and shall have discontinued possession or receipt, such right shall be deemed to have first accrued at the time of such discontinuance. By sec. 7, in the case of a tenancy at will, the right of the person subject to such tenancy is to be deemed to have accrued at the end of one year from the commencement of the tenancy, with a proviso that a cestui que trust shall not be deemed to be a tenant at will, within the meaning of the section, to his trustee. The case of *Garrard v. Tuck* (8 Com. Ben. Rep. 231) establishes the doctrine that a cestui que trust, who is let into possession of the trust estate by the trustee, becomes his tenant at will, and in such case the right of entry under the above 2nd section accrues only on the determination of such tenancy at will. The above case of *Melling v. Leake* establishes that this doctrine does not apply to the case of a cestui que trust who is merely allowed to receive the rents or otherwise deal with the estate which is in the hands of the occupying tenants. In that case the management of an estate was intrusted by trustees, entitled to an estate in fee, to the cestui que trust for life, as beneficial owner, and the latter, having never been in actual occupation, in 1817 let C. into possession, who occupied during the life of the cestui que trust, for more than twenty years, without paying rent or acknowledging title: it was held, that a tenancy at will had not been created between the cestui que trust and the trustees, and that C. had therefore acquired a good title, by adverse possession, under the above act. (*Melling v. Leake*, *suprà*.) In delivering the judgment of the court Mr. Justice Cresswell said: "On the trial it appeared that Isaac Melling, the father of the plaintiff, being seised in fee of the house which is the subject of the action, demised it to John Leake and Thomas Wildman, as trustees (giving them the legal estate in fee) in trust for William Melling (the brother of the plaintiff) for life, and after his death on certain other trusts.

The testator died in 1815. At that time Leake (one of the trustees) was in possession of the house in question; he continued there a little time, and was succeeded by one William Clarke, who continued to occupy till the plaintiff married his daughter, and held one part of the house, Clarke continuing to occupy the other until a period of more than twenty years before the entry of the defendants, which was the cause of action. When Clarke left, the plaintiff occupied the whole and continued to do so without paying any rent till 7th June, 1854, when William Melling, the *cestui que trust*, being dead, the defendants, as representing the trustees, entered and expelled the plaintiff from the possession of the house. On these facts appearing at the trial (without a jury) before Parke, B., that learned judge was of opinion that the plaintiff was entitled to a verdict, and directed it to be entered accordingly, inasmuch as by occupying without payment of rent, or acknowledging title either to the trustees or the *cestui que trust*, he had gained a title against both, but the learned judge reserved the point. On the argument before this Court it was contended, on behalf of the defendants, that the learned Baron was wrong, because, according to the case of *Garrard v. Tuck*, 8 C. B. 231, a tenancy at will subsisted between the trustees and the *cestui que trust*, which tenancy was never determined till his death in 1853, and that the title of the trustees to the possession did not therefore accrue till that time. The authority cited certainly supports the doctrine that a *cestui que trust*, who is let into possession of the trust estate by the trustee, becomes his tenant at will, and the right of entry under the 2d section of the statute 3 & 4 Wm. 4, c. 37, accrues only on the determination of such tenancy at will; and accordingly, in the present case, if the *cestui que trust*, William Melling, had been let into possession by the trustees, a tenancy at will would have been established, which would not have been determined by his letting in Clarke as his under-tenant, unless the trustees had had notice of such underletting (of which there was no evidence) for though the general rule is; that a tenancy at will is not assignable, because the transfer determines the tenancy, yet the rule is subject to the qualification that a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord; *Pinhorn v. Souster*, 8 Exch. 763. But, although it may well be argued, on general principle, as well as on the authority of *Garrard v. Tuck*, that a *cestui que trust*, who is in possession with the consent, or even the mere acquiescence of the trustee, must be regarded as his tenant at will, yet this doctrine (as it is observed in the excellent note of Messrs. Morley and Coote, in their edition of *Watkins on Conveyancing* 19), applies

only to the case where the *cestui que trust*, is the actual occupant. If he is merely allowed to receive or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees who choose to allow him to act for them in the management of the estate and the consequence appears inevitable that, if the actual occupier is, under such circumstances, permitted to occupy for more than the twenty years, prescribed by the statute 3 & 4 Will. 4, c. 27, without paying rent, the result must be that the trustees lose their title exactly as in an ordinary case of landlord and tenant. In the present case William Melling, the *cestui que trust*, was never in the actual occupation, and assuming that by his permission Clarke obtained possession, the management of the estate having been entrusted by the trustees to him as the beneficial owner; yet this state of things did not, in our opinion, constitute a tenancy at will between him and the trustees. He merely acted, we think, as their bailiff or agent in the transaction. For these reasons we think that the opinion of Parke, B., was well founded, and that the verdict for the plaintiff ought not to be disturbed."

LAW REPORTS AND DIGESTS.

We have before called attention to the very numerous reports in existence, and have stated our views as to the inconvenience thence arising, which, however, as we stated, was somewhat mitigated by the publication of digests, though these last are seldom to be relied on alone, being often incomplete and occasionally erroneous. We have now to call attention to the decision of the majority of the court of common pleas in the case of *Sweet v. Benning* (1 Jur. N. S. 543; Week. Rep. 1854-5, p. 519), which held (dissentiente, Maule, J.) that the proprietors of a periodical professing to be an analytical digest of equity, common law, and other cases, and in which work the head or marginal notes of cases were copied verbatim from (among other reports) the *Jurist*, the copyright of which was in the plaintiffs, were guilty of piracy, and liable to an action for the recovery of damages in respect of such piracy. As the head or marginal note of the case in the *Weekly Reporter* puts it, "If the reports of a periodical are headed by the reporters with head notes (as part of the report) being compendious statements of the decision in each case, and any person, for the purpose of forming a digest of cases, extract such head notes *verbatim* from the reports in the periodical, and insert them, together with head and marginal notes of the same kind, from other reports, in his own work, according

to an arrangement of his own, this (*per* Jervis, C. J., Cresswell and Crowder, JJ.) amounts to piracy, for which the proprietors of the periodical may recover in an action at law." This decision is one obviously of the utmost importance to the profession, and, assuming its correctness, notwithstanding the dissent of so able a lawyer as Mr. Justice Maule, it will have some grave consequences. Thus it appears impossible that any perfect digest should hereafter be published unless the consent of all the proprietors of the reports can be obtained, which, considering the rivalry existing in law bookselling and publishing, seems scarcely probable. Already the inconvenience has been felt in the case of a digest published for the *Law Times*, which has been delayed, if not altogether stopped, by the result of the decision, whilst the publication which was held to be a piracy was at once extinguished. We do not apprehend any evil effects as to ourselves, as our plan is not merely to copy out the marginal notes (which is what was complained of), but rather to furnish such a statement of the decisions, and the principles on which they are grounded, as may at once instruct the practitioner and the student. If the decision should put a stop to mere digests it will not be a great evil, if in their place a better and more satisfactory class of productions should arise, adopting some such plan as ours, though we fancy the proprietors of the reports will have no occasion for congratulating themselves on the change. For many who now avoid mere digests, from being aware of their defects and deficiencies, might be induced to take in a better production, in which they could feel some confidence, without having to compare it continually with the report, as every reader of a digest is now compelled to do, if anxious to save himself from error. To return, however, to the case of *Sweet v. Benning*: having stated the actual point decided, we propose to introduce the judgments of one of the majority, and of the dissenting judge:—

C. J. Jervis, in his judgment, after stating that the question of piracy was a difficult one, and expressing regret that the court was not unanimous, said:—"Upon the best consideration I can give to the case, it seems to me that there was a piracy on which the action may be founded. It is difficult to lay down a general rule upon this subject; and I do not adopt or subscribe to the proposition propounded by Mr. Lush, that the printing of every portion of a work would be the foundation of an action. I think it is a question of degree, which must be varied by the different circumstances of each case. In this case there has been, I think, an abuse of the fair right of extract or comment, and, in truth, a republication or reprint of a composition, the property in which was in the plaintiffs. The work from which this has been

taken, the *Jurist*, consists of double reports of each case, one in which the reporter professes to give a detailed report of the case, with the argument and the judgment of the court at length; and the other, an abstract of the case in the shape of a marginal or head note, in which he furnishes the principle of law and a short and summary statement of the facts; they are, in truth, two reports—a long and a short report; and the gentleman who has compiled this digest has taken verbatim, as the case states, the short reports to which I have alluded. If he may be allowed to do that, it is plain that he may take the other—viz., the lengthened one, or he may take both, and the question is, can he, by any different arrangement of the reports, or digest, as he calls it, take them? In my opinion he cannot. I quite subscribe to the doctrine that a digest may be well made without subjecting the party making it to an action, where the author of the digest applies his mind to the subject, and extracts from the case the principle of law by the labour of his own brain, and so produces an original work; but here this is merely (except the analytical arrangement, which is a mere mechanical operation) that of cutting out the whole of the marginal notes, or head notes, as they are called. In my mind, the case referred to, of *Butterworth v. Robinson* (5 Ves. 709) is decisive of this case, because there the complaint was, that, omitting the arguments, the party who was the alleged pirate had reprinted the reports, including the judgment of the court; and although he had arranged them alphabetically, under appropriate heads, for the purpose of easy reference, it was held not to be a ground of protection, but he was held to have pirated the work of the original author, and the Lord Chancellor granted an injunction. On these grounds I think that the plaintiffs are entitled to recover."

Mr. Justice Maule was the dissentient judge, and he said: "With respect to the act complained of as a piracy, I do not so clearly concur in what my Lord Chief Justice has expressed, and what I understand is the opinion of the other learned judges who will pronounce their opinions after me. It is not very wonderful that there should be some difference of opinion upon such a subject, because it is hardly so much a matter of kind as a matter of degree. It is difficult to draw a line where the act is only a question of quantity, but it is more easy to draw the line where the question is whether the thing is colourable, and so unlawful. In this case the inclination of my opinion is, that this is a different work, and made with a different object and with a different result, from the work of the plaintiffs. It may be that some persons may be able to dispense with, or may be induced to dispense with, the work of the

plaintiffs by purchasing or using that of the defendants, though a very imperfect substitute for it, and I should doubt whether in any case it would enable a person to dispense with the plaintiffs' reports when, he really wanted them. Probably it may enable persons to buy more cheaply the means of finding out what had been decided by the courts, without going to the expense of buying the reports in extenso. When, however, a report is known to exist that may have some probable application to a case, then recourse, I should think, would be ordinarily had to the report itself at length; and thus it may induce persons to buy the report itself, or to have recourse to it in the libraries of institutions, or combinations of persons. But I think its having that effect is no argument in favour of this being a piracy, but rather the contrary, because it seems to do a something which is not required by persons who want to use those reports. Then it is said, and so my Lord Chief Justice considers, that these marginal notes constitute another report. I do not think that that is the case; for though marginal notes in some instances do constitute another report, those are not the best marginal notes, and the reporter has recourse to them when he cannot give what I consider the more legitimate marginal note, which is not a different report of the circumstances of the case, and a statement of the conclusions drawn from them, but a statement of the principle or doctrine of law which is considered to be established by the case at length, without stating at all how it arises. In no sense is it, or is it like, a report; and that takes away what was pressed upon us in the argument—the idea, such as it is, of there being in these cases a double report. They are not, in my opinion, double reports; but they are what they are—marginal notes. In some respects they are occasionally an abridgment of the report; that is, when the reporter is unable to extract some very clear doctrine of law capable of being stated conveniently in an abstract, he then relates all the circumstances of the case, and says, 'If A. demises to B. by a certain instrument, and afterwards B. dies, and makes a will in such and such terms,' and so forth. Such a marginal note is no doubt another report; but that is not the usual style of a marginal note. Well, then, it is true that the very words of these marginal or head notes, and the head notes of a considerable number of other reports that are published during the month, are contained in this publication of the defendants. Now, it is agreed that it is not every verbatim extract that is the subject of an action of piracy. It will depend upon the proportion the verbatim extract bears to the whole work. Nobody denies that the mere length of these extracts is not such as to make it the subject of a piracy in that respect.

Now, it must be taken, I conceive, in this action, that the plaintiffs are the only persons who complain of what the defendants have done. What the defendants have done is this—they have devised, or adopted from somebody else, a certain scheme of distribution of the doctrines of law which are promulgated by the courts within the last month, and of putting them into such an order or arrangement as affords convenience to the profession, and those who have occasion to use the law books, in inquiring into questions of law. The order and arrangement the plaintiffs had no right to complain of, as that is not their own; and according to that order and arrangement the defendants have distributed a considerable quantity of matter containing such legal propositions, of which by far the larger part the defendants are entitled, under some circumstances, to be considered the owners. Now, certainly, under that state of things, it seems to me that the defendants have made a book differing altogether from the plaintiffs' book, and effecting a different purpose from the plaintiffs' book. I conceive, therefore, they have not, in the sense in which it is unlawful, taken any part from the plaintiffs' book, but that they have dealt no otherwise with it than a person does who, to support some argument or view of his own, makes extracts from the book of another person, without any intention of evading the right of the person to publish the whole or a part of it. As I said before, I have had some difficulty in drawing the line, and very likely I have not taken the right side. If the case had been of sufficient importance, I should have desired more time to be taken to have further considered it; to revise my opinion; and certainly to express more fully and clearly what are the reasons that induce me to come to my present conclusions.

CHARGING ORDER AFTER ASSIGNMENT WITHOUT NOTICE OF CHOSE IN ACTION.

As we have called attention (1 Chron. pp. ii., 93) to the decision of the court of Queen's Bench in the case of *Watts v. Porter* (1 Jur. N. S. 133; 23 Law Tim. Rep. 238), respecting the necessity for giving notice of the assignment of a chose in action and the efficacy of a charging order in such a case, it being held to have priority over the assignment without notice, and, as such decision has given rise to much discussion, and great doubts have been expressed as to its correctness, we avail ourselves of the following statement from the *Jurist* of the grounds of objection to the decision. We should state that a writer in an earlier number of the *Jurist* took a very different view, and that the

following remarks have elicited various communications from correspondents dissenting therefrom. The supposition is, that the celebrated case of *Whitworth v. Gaugain* (Cr. and Phill. 325) is in opposition to the decision in *Watts v. Porter*. It is said that the contention in *Whitworth v. Gaugain* was between a mortgagee who had an equitable title and a subsequent judgment creditor who had a legal title to whatever his judgment covered, which would prevail over the mortgagee's equitable title if it covered the mortgaged property; and that Lord Cottenham at first thought that the judgment and the mortgagee's title were in conflict, and if that had been so of course the judgment would have prevailed, but that view was ultimately corrected, and it was held that the judgment only bound what the debtor had at the time, viz., the equity of redemption. On the other hand, the contention in *Watts v. Porter* was between a mortgagee of a chose in action who had not given notice to the trustees, and a subsequent judgment creditor who obtained a charging order, and by giving notice to the trustees acquired a title which would prevail over that of the mortgagee, so far as they were inconsistent. The only question, it is said, was, did the judgment or the charging order bind more than that which belonged to the debtor at the time, viz., his equity of redemption. *Whitworth v. Gaugain* decided that it did not, whilst *Watts v. Porter*, it is alleged, decided that it did; and the two cases are therefore said to be in conflict. It is alleged that the mistake of the Court of Queen's Bench consisted rather in supposing that the judgment and charging order had the same effect that an express charge of the property as unincumbered would have had, than in a misrepresentation of the doctrine of *Dearle v. Harle* and *Loveridge v. Cooper* (3 Russ. 1.)

The writer in the number of the *Jurist* for the 4th of August last says:—"The clauses of the statute 1 & 2 Vic. c. 110, which give to judgment creditors the same rights against the debtor's property as if he had himself charged it with the debt have been prolific of perplexing questions. In the case of *Whitworth v. Gaugain* (Cr. & Ph. 325), Lord Cottenham was misled by the word 'charge' into an erroneous interpretation of the act, which was corrected by Sir J. Wigram, V. C., and afterwards abandoned by the chancellor himself, with the unanimous assent of the profession (3 Hare, 416; 1 Ph. 728). In *Hawkins v. Gathercole* (1 Sim. N. S. 74), Lord Cranworth, while Vice-Chancellor, decided, upon words which were certainly literally capable of no other construction, that the act extended to charge benefices; and the reversal of his decision by the Lords Justices (1 Jur. N. S. part 1, p. 481)

has not met with such universal acquiescence. The case of *Watts v. Porter* (decided by the Court of Queen's Bench in Trin. Term. 1854; 8 El. & Bl. 743; 1 Jur. N. S. part 1, p. 133) may, perhaps, be classed with those we have mentioned, as one in which the fatal word 'charge' has betrayed more judges. That case arose upon the 14th section of the act, which is rather differently worded from the 18th. It enacts, that if a judgment debtor has any Government stock, funds, or annuities, or stock or shares of or in any public company, standing in his name, or in the name of a trustee for him, a judge of one of the superior courts may, on the application of the judgment creditor, 'order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall be charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor.' In *Watts v. Porter*, which was an action against an attorney for negligence in lending his clients money on the security of a mortgage of an equitable interest in a sum of stock, without giving notice of the mortgage to the trustees of the stock, the loan was made in 1844; in 1847 two creditors of the mortgagor recovered judgment against him for a debt exceeding the value of the stock, and in 1848 obtained a judge's order charging the stock with the judgment debt, which order was regularly entered in the books of the Bank of England, and notified to the trustees of the stock. The debtor was subsequently discharged by the Insolvent Debtor's Court; and it was held by Lord Campbell, C. J., and Wightman and Crompton, J. J. (dissentiente Erle, J.), that the charge created by the judge's order had priority over the mortgage; for it was by no means to be imputed to the legislature that in speaking of a charge it did not contemplate a fraudulent charge as much as an honest one. They relied on the doctrine in *Dearle v. Hall* and *Loveridge v. Cooper* (3 Russ. 1) that 'whenever persons treating for a chose in action do not give notice to the trustee or executor who is the legal holder of the fund, they do not perfect their title, and they do not do all that is necessary in order to make the thing belong to them in preference to all other persons.' Lord Campbell, in delivering judgment for himself and his colleagues, said, 'Every tribunal administering justice according to the statute must consider only the effect intended by the legislature to be given to the charging order; and this is to be learned from the language in which the meaning of the legislature is expressed, without interpolating something not to

be found. In the 14th section it gives in the most unequivocal terms the same remedies to the judgment creditor who has obtained the charging order to which he would have been entitled "if such charge had been made in his favour by the judgment debtor." The defendant's counsel contended that we are bound to understand the word "honestly" to be implied, and that the charging order is only to have the effect which a charge of the debtor would have had if made honestly. *To interpolate the word "honestly" would, we think, be a qualification of the enactment wholly unauthorised.* The words that are to be understood as implied by the legislature, we think, are, "validly and effectually." [Is not this "interpolating something not to be found?"] 'The debtor could not validly and effectually make a charge to have priority over an antecedent equitable charge to which the incumbrancer has completed his title, and therefore the charging order has no such operation, but the first incumbrancer, not having completed his title by notice to the trustees, the debtor might make a charge to a subsequent incumbrancer, which in point of law would be valid and effectual. At the time of this charging order the stock still continued to stand in the names of the trustees, in trust for the judgment debtor; till notice from the mortgagees they were not trustees for her; and immediately after notice of the charging order they became trustees for the judgment creditor." The short answer to this appears to be a denial of the assumption that the trustees of the stock were not trustees for the mortgagee before notice. It is perfectly clear that they became so immediately upon the making of the mortgage, and that a voluntary assignment of the stock by the mortgagor, perfected by notice to the trustees, would have passed nothing more than the equity of redemption. From the date of the mortgage the trustees held the stock in trust for the mortgagee, and subject to the satisfaction of his charge, in trust for his mortgagor. It was upon this last trust alone that the charging order operated. Thus, if after the first mortgage the mortgagor had made a second mortgage of the stock (even without notice of the first), the second mortgagee would, by virtue of his mortgage merely, take nothing but a charge on the equity of redemption; and if he had notice of the first mortgage when he made his advance, he could not enlarge his right by diligence in giving notice to the trustees. Would notice of the first mortgage to the judgment creditor before obtaining his judgment, or before obtaining his charging order, or before giving intimation to the trustees, confine his charge to the equity of redemption, in the opinion of the Court of Queen's Bench? Nothing can be clearer or more

conclusive than the following concise summary of the doctrine in *Whitworth v. Gaugain* given by Erle, J., in the case under consideration:—

"The debtor's interest only is charged, for the condition in the statute for the charge is, that there should be stock standing in the name of a trustee, in trust for the debtor. Now, if the debtor has already assigned the stock without notice to the trustee, it is not standing in trust for him, but in trust for the assignee—at least, as between these parties. The assignee could at any time compel the trustee to transfer the stock to him, and neither the debtor nor the trustee could resist the claim of such assignee on the ground that he had given no notice to the trustee; and what is true of an assignment of the whole stock is true of a partial charge thereon.

"It is admitted that this would be the effect of the charging order upon stock standing in the debtor's name, and equitably mortgaged by him before the charging order. The equitable mortgagee would have priority; for the debtor would be trustee of the stock for him, and the stock would not be standing in his name on his own behalf. It is not probable that the Legislature intended to give a greater effect to the order upon stock standing in the name of a trustee than it would have upon stock standing in the debtor's name.

"Also the charge intended by the statute must be taken to be a lawful charge; for it is not to be supposed that the Legislature intended to force the debtor into the situation of a breaker of the law. Now, if the debtor made a lawful charge on stock, he would either specify his interest therein, or charge it subject to outstanding incumbrances. The compulsory charge by a judgment creditor is analogous to a charge expressed to be on such interest as the debtor might have; and if worded in that way, the charge would give no right beyond what the debtor had, as a charge so worded seems to be notice to the creditor taking it to inquire. The second charge would not take priority over the first, unless the debtor charged as unincumbered that which was incumbered; if he did so, he would clearly violate the law, so far as to be liable to an action of tort for the damage arising from the false representation. If he asserted expressly that it was unincumbered, and obtained the advance by that falsehood, he would be indictable for a false pretence. The judgment creditor, therefore, would not be entitled to priority over the first mortgagee if the charge intended in sec. 11 is a lawful charge.

"Furthermore, the claim to take the stock from the first mortgagee is not a remedy against the debtor, for he has lost the stock in any event, but a remedy against the first mortgagee—a remedy given upon the general principle for deciding which of two

innocent claimants shall suffer by the fraud of a third party, viz., he who facilitated the fraud. Such is the doctrine of *Loveridge v. Cooper*. Now, a judgment creditor is in no analogy with a second mortgagee who has been deceived into taking as unincumbered, a security that was incumbered. The judgment creditor has trusted to no particular security; he has rights which may be made to charge all the available assets of the debtor, and among the rest his [equity of redemption of the] stock; but he has advanced nothing on the stock, and has been in no way deceived in respect thereof; and the judgment debtor, by suffering judgment, has not used deception, nor been guilty of fraud. The reason, therefore, for giving priority to a second mortgagee over a first wholly fails in respect of a judgment creditor.'

"It will be seen, that the Court of Queen's Bench, in deciding *Watts v. Porter*, has committed precisely the same mistake which Lord Cottenham made on the first hearing of *Whitworth v. Gaugain*, and which he subsequently corrected. We confidently anticipate that the authority of *Whitworth v. Gaugain* will be restored by a reversal of the decision in *Watts v. Porter*."

REMUNERATION OF SOLICITORS.

The Metropolitan and Provincial Law Association have lately issued a most important report on the injustice lately done to the body of solicitors by the diminution of their remuneration for Chancery business. In this document it is (among other things) said: "Since the Act for Consolidating the Law of Attorneys in 1842—by which conveyancing business was rendered subject to taxation—the solicitors have been placed, as to the whole of their occupation and earnings, under the absolute dictatorship of the courts. New schemes of legislation are now in progress as to conveyancing and other branches of solicitors' business. Should any of them be carried through, and the same violent hand be laid upon their remuneration as to those other branches of occupation, as there has just been with regard to chancery, the profession, as an honourable mode of livelihood, will be at an end. Those solicitors who remain in the profession will be able to live only by accepting the invitation now held out by the present system, and unduly lengthening and multiplying proceedings." After referring to the passing of the Solicitors' Consolidation Act, by which conveyancing bills became taxable, it is said: "The Incorporated Law Society then pressed Lord Langdale to get orders made establishing the *quantum meruit* principle of taxation, for which all these steps had been

mainly projected. But although Lord Langdale always admitted their right to have this done, yet, from some unexplained reason, from that time to the present, nothing has been done; the old technical and absurd principles of taxation have been allowed to continue in force until they were rendered still more absurd and unreasonable in principle, as well as utterly unremunerative in effect, by the recent changes. The whole correspondence with Lord Langdale, extending over several years, is now printed by the Incorporated Law Society, and the breach of faith to the solicitors, which its perusal will establish, must excite astonishment in every reader. Meantime, in every way the solicitors have felt themselves slighted by the authorities of the great seal with reference to all the important chancery changes which have been under consideration during the last ten or twelve years, but more recently in the orders of 1852, which, made and published without consulting them, took away their livelihood, and thus they were not only slighted, but injured. Formerly it was not so. In the years 1840-41-42, they were not only kept informed of all changes, but were requested, to a great extent, firstly to propose, and then to prepare, the heads of the different orders and acts of Parliament required to effect them. To Lord Eldon's commission, and to the common law commissions, members of their body were secretaries, and the authorities of the law then recognised the important fact, that the solicitors were the only persons known to and trusted by the suitors—that they were the guardians of the suitor's purse, and alone acquainted with the facts as to time occupied and money expended in the prosecution of suits; such being the two classes of facts all-essential in considering reforms. Since that day, however, they have been quite passed by, although the origin of every great improvement in the Court of Chancery (or of almost every one) may be traced to their body." After referring to a particular instance in illustration of the above, the report continues: "During the last ten or twelve years, many changes affecting the emoluments of the profession have been made, and on none of them, we believe, have the profession been consulted; not even as to the orders for substituted remuneration. Careful comparisons between the profit arising to solicitors from given quantities of chancery business twelve years ago, and now, have been made; and during all that time, it is clear, that the work, on the one hand, has been becoming more onerous to the solicitor, and his remuneration on the other less. The effect of this and other changes on the numbers of the profession is very remarkable. The solicitors now taking out certificates are about one hundred less in number than they were ten years ago, though, to

have kept pace with the population and wealth of the country, they ought to have been 1100 or 1200 more. Notwithstanding the reduction in duty on articles, the number of clerks annually registered on the average of the last three years is very nearly one-third less than it was twelve or fifteen years ago. The particular injustice recently done to the solicitors, and which should excite the serious attention and alarm of the whole body, was, as has been stated, under the Master in Chancery Abolition Act. Everyone knows that a fee is not pay merely for the one piece of work on the completion of which it becomes payable, but for all the previous work intervening between that point and the last-earned fee. The old fees for drawing and copying states of facts, for instance, covered all the work of reading the papers and collecting the necessary materials together. And so on as to all other fees. In a change of practice the real work is never changed. The development of the essential points of a suit requires such real work to be done somehow. The shape only is shifted. The hand may work in a different way and degree, but the brain goes through the old path. By the 38th section of the 15 & 16 Vic. c. 80 (the Master in Chancery Abolition Act), the Lord Chancellor is empowered and required, with the advice and consent of the Master of the Rolls and the Vice-Chancellors, or any two of them, forthwith to make and issue general rules and orders for regulating (*inter alia*) the fees and allowances to solicitors in respect of the matters to which the said act relates; i. e., for the work which is now performed in the chambers of the respective judges. The requirement of so many concurring judges in this order was most unusual, and would seem to betoken a desire to insure great attention to a subject so vital to the body of solicitors. By the same section it is also provided that "no greater amount of fees shall be payable by the suitors of the said court to the officers thereof, in respect of the business to be conducted before the Master of the Rolls and the Vice-Chancellors respectively sitting at chambers, and their respective chief clerks than is now levied in respect of similar or analogous business in the Master's offices.

"In making the orders under this bill, it is confidently believed that no one single practising solicitor was ever consulted, and only one taxing master, and that his observations were altogether disregarded. Orders prepared in this way were signed by the Lord Chancellor, the Master of the Rolls, and two Vice-Chancellors, and these orders first became known to the solicitors after they were so signed and promulgated. By these orders the profit of the solicitors was so destroyed, that had they no other

occupation besides Chancery business, the whole body would now have ceased to exist. When fees affecting the Fee Fund are altered, the most careful statistical estimate of the probable effect of the change is first prepared, for the satisfaction of the authorities. Were any, for such purpose, prepared in this case? Did the judges require from the Lord Chancellor the estimate on which the scales laid down by these orders were based? It cannot be supposed that the legislature meant that they should sign orders, merely by way of conformity, which were certain to be so vital, and possibly, and as it turns out really, so destructive to the great body of court officers affected by them. Nor can it be supposed that it was intended that less care should have been taken in their case, when an error could not be wholly remediable, than in the case of court fees, as to which, if there be an error, the whole suitors' fund, amounting to upwards of £1,000,000., is a permanent guarantee. Such are the injuries complained of—first, the neglect of the court to give the promised orders for a more discretionary system of taxation; secondly, the gross inadequacy of the orders of Oct. 1852, to fulfil the equitable meaning of the requisite of the act; and thirdly, the way in which those orders were made, without previous communication with the profession. It is to be expected that the profession, who have been so seriously injured by the mode in which the above-mentioned directions were carried out, should feel not only greatly aggrieved, but considerably alarmed, and protest against general orders so vitally affecting their body, and dealing with half the business of the court, being in any case so made without their previous knowledge. If these administrative matters were placed in the hands of a minister of justice amenable to Parliament, with an Under-Secretary in the House of Commons, they would have greater consideration, and the rights of all parties be duly cared for. Meanwhile, the committee congratulate the members that the attention of the authorities has at last been drawn to the subject. The Incorporated Law Society brought the matter before the present Lord Chancellor, who gave his serious attention to it, and has referred it to Lord Justice Turner, Vice-Chancellor Wood, Mr. Follett and Mr. Walton, to report on.

"Assuming a right to maintain a fair rate of remuneration for actual work, based upon our previous emoluments, we must inquire—

"2ndly. 'Have the late changes in practice and orders of the court (either or both) impaired the solicitor's remuneration for actual work, and if so, to what extent?'

"Accounts, which have been carefully prepared by two members of this committee, have been already

sent in to your Lordship. They show that the effect of the recent alteration has been to reduce the profits of solicitors more than one third (*viz.*, about two fifths), without making any allowance for dead-weight charges of interest on the capital embarked in the business, or the necessary deductions for bad debts, those dead-weight charges remaining very much as they were before. These accounts the committee believe may be entirely relied upon. It is easy to make up accounts, but those under observation are taken, not from materials compiled for the present purpose, but from the actual Chancery accounts of two solicitors in extensive practice, as made out in the ordinary course of business, before any thought of using them for the present purpose could have arisen. Should there be any doubt on the point, the accuracy of the conclusions drawn from these accounts is of such vital preliminary importance, that it is submitted your Lordship should at once cause them to be thoroughly sifted.

"3rdly. 'Assuming that solicitors have suffered a diminution of two-fifths of their remuneration for actual work done in the Court of Chancery, what is the wisest mode of repairing the injury?'

"The paper of alterations in fees suggested by the Incorporated Society has been now modified in consultation with members of this committee; and we believe that in its present shape (under the date of June 21) it is well devised to meet the probable exigencies of the case.

"The present inadequate remuneration results by no means exclusively from the last alterations, but in a considerable degree from all the changes which have been introduced since the year 1845; and we feel convinced that business paid for upon the scale now proposed would not yield larger emoluments than were obtained for an equal amount of work ten years ago.

"In considering the paper of suggestions, and in proposing changes in it to the Incorporated Law Society, we have had in view the cogent reasons which are above stated to have influenced the House of Commons' Committee on Fees, and have endeavoured to avoid increasing those fees which may be multiplied almost *ad libitum*, and sought to place the increase upon those substantial matters which denote real progress in the case. We know the great desire of the taxing masters to have everything as much as possible a matter of fixed scale; but we have thought such desire, however natural, to be detrimental to the suitor, and opposed to the objects for which they were appointed. We have considered, indeed, how far it might be right to leave the taxing masters, like a jury, on a *quantum meruit*, without appeal. This we thought would not be altogether right; but feeling that the present

system of appeal was not fair, either to them or ourselves, we have suggested to the Incorporated Law Society, and they have cordially agreed, that it should be proposed to let all appeals on allowance of costs go to the judge in chambers, who might in that case have the taxing master attend him on the appeal, and give explanations, as he does in court at common law.

"With reference to the very important subject of adopting, if possible, in the case of legal agency, the *ad valorem*, or per-centage principle, which the wisdom and experience of the world, where unrestrained, has almost invariably in every other class of agency introduced, in this and every other country and as to legal agency has introduced it in every other country except this, we have felt that the introduction of such a principle would only be extending the principle on which pauper suits are required to be conducted:—and thus permitting the small business of the court, which involves a minor degree of risk and responsibility, and which is undertaken for parties less able to bear the charge, and results in decrees of less pecuniary value, to be conducted for a rate of remuneration which would be entirely inadequate in large and heavy matters. This view of itself, the committee submit, would require (were there no other consideration), that to a certain extent business ought to be charged for in proportion to the value of the property affected. But when to this consideration is added the further one, that thus only can an identity of interest between the employer and the employed be effectually secured, the subject becomes of the highest importance. We believe (in common, we think, with the bulk of our branch of the profession) that a bold application of this almost universal principle of remuneration to legal affairs, so far as agency and administration goes, would be one of the wisest and largest improvements in the general working of the law which could be devised. So far as the suggestions of the Incorporated Law Society involve any approach to this view they have our especial approbation. The amended suggestion of two or more scales of remuneration emanated from us, and we would press it especially upon your consideration. If the *ad valorem* principle were approved, there would not, we think, be much difficulty in settling the details."

LIMITED LIABILITY PARTNERSHIPS.

The bill relative to the establishment of partnership on the limited liability system has, after many alterations and much opposition, been passed, and is the most important statute of the session in respect to the establishment of what must be

considered as an innovation on the established rules of law. The act itself is not very long or complicated, but it has the effect of incorporating the provisions of the 7 & 8 Vic. c. 110, being the act for the registration, incorporation, and regulation of joint-stock companies. We do not venture to give any decided opinion on the operation of the act in a commercial point of view, but we confess we do not see any reason to suppose that it will give rise to any great amount of cheating or swindling as some of its opponents have so liberally insinuated; indeed, the measure is but an experiment, and if found to work ill it can soon be amended, and on the other hand if found to work well it can readily be extended. If the bill has had its deprecators it has also had its sturdy champions, and among the rest the powerful *Times*, in which, shortly after the passing of the act, an article appeared from which we extract the following:—"To any unprejudiced observer, it must appear, at first sight, a very remarkable thing that there should be any opposition at all to such a measure as the Limited Liability Bill. Why in the world is it so obnoxious, so intolerable, so execrable a thing that a man having, we will say, £500, should not be permitted to lend it to a neighbour on the simple and innocent condition of sharing his neighbour's profits, in case of success, and losing no more than his £500 in case of failure? Where is the extravagance, where is the dishonesty, where the peril, where is the un-English character, where is the inevitable loophole for roguery and folly, in such a proposition? In our humble opinion, it may fairly be assumed that, as a general rule, an Englishman who has scraped together £500, or even come by it in some less tedious way, will take care of it, if he can, and will not put it into the hands of the first fool, or the first knave, who asks for the use of it. The penalty of losing the money will generally be quite enough to deter the owner from a very wild investment, if there is the opportunity of a better one. Why is it, then, that the proposed liberty of advancing money on the terms just described should be fiercely disputed, on the ground that the penalty of losing all the money so advanced is not enough, and that the lender must be bound not only to the amount of his advance, but to the whole of his means, every farthing he has in the world, every earthly thing he possesses, and his personal liberty besides? Why this desperate determination to bind a man not only up to the whole of his venture, but to all that he has, body and soul?"

There can be no doubt that the act will give rise to much professional work, and therefore the lawyers have no cause to grieve over the passing of the

measure, even though they may not exactly approve its principles. The following are the provisions of the act:—

SEC. 1.—*Mode of obtaining limited liability by future companies.*—Any joint stock company to be formed under the act of the eighth year of Her Majesty, cap. 110 (other than an assurance company), with a capital to be divided into shares of a nominal value not less than ten pounds each, may obtain a certificate of complete registration with limited liability upon complying with the conditions following, in addition to doing all other matters and things now required in order to obtain a certificate of complete registration; that is to say, 1st: The promoters shall state on their returns to the office for provisional registration that such company is proposed to be formed with limited liability. 2nd: The word "limited" shall be the last word of the name of the company. 3rd: The deed of settlement shall contain a statement to the effect that the company is formed with limited liability. 4th: The deed of settlement shall be executed by shareholders, not less than twenty-five in number, holding shares to the amount in the aggregate of at least three-fourths of the nominal capital of the company, and there shall have been paid up by each of such shareholders on account of his shares not less than twenty pounds per centum. 5th: The payment of the above percentage shall be acknowledged in or indorsed on the deed of settlement, and the fact of the same having been *bond fide* so paid shall be verified by a declaration of the promoters, or any two of them, made in pursuance of the act made in the sixth year of the reign of his late Majesty King William the Fourth, cap. 62. And upon such conditions being complied with, and such other matters and things done, the registrar of joint stock companies shall grant a certificate of complete registration with limited liability to such company.

SEC. 2.—*Mode of obtaining limited liability by companies now or hereafter registered.*—Any joint stock company, except as aforesaid, now or hereafter completely registered under the said act of the eighth year of Her Majesty, may obtain a certificate of complete registration with limited liability, in manner and subject to the condition following; that is to say, the directors of such company may, with the consent of at least three-fourths in number and value of its shareholders who may be present, personally or by proxy, at any general meeting summoned for that purpose, make such alteration in the name, nominal value of shares, and deed of settlement of the company as may be necessary for enabling it to comply with the conditions hereinbefore mentioned with respect to joint stock companies seeking to obtain certificates of complete registration with

limited liability; and upon compliance with such conditions the registrar, after the affairs of the company shall at the expense of the company have been audited by some person appointed by the board of trade, and on certificate from the said board that the complete solvency thereof has been established on such audit to its satisfaction, shall grant to such company, by its new name, a certificate of complete registration with limited liability, and thereupon all privileges and obligations hereby attached to companies with limited liability, their shareholders, directors, and officers, shall attach to the company named in such certificate, its shareholders, directors, and officers.

SEC. 3.—*Mode of obtaining limited liability by existing companies constituted under private acts of Parliament.*—Any joint stock company, except as aforesaid, constituted under any private act of Parliament, whereof it shall be proved to the satisfaction of the board of trade, after the affairs of the company shall, at the expense of the company, have been audited by some person appointed by the board of trade, that the said company is perfectly solvent, and that not less than twenty per centum of three fourths of the nominal capital of such company has been paid up, may obtain a certificate of complete registration with limited liability, in manner and subject to the condition following; that is to say, the directors of such company may, with the consent of at least three fourths in number and value of its shareholders who may be present, personally or by proxy, at any general meeting summoned for that purpose, make such alteration in the name and nominal value of shares as may be necessary for enabling it to comply with the condition in that behalf herein-before mentioned with respect to joint stock companies seeking to obtain certificates of complete registration with limited liability; and upon compliance with such condition the registrar, on receipt of a certificate of the solvency of the company, and of the payment of capital as before mentioned, shall grant to such company, by its new name, a certificate of complete registration with limited liability; and thereupon all privileges and obligations hereby attached to companies with limited liability, their shareholders, directors, and officers, shall attach to the company named in such certificate, its shareholders, directors, and officers.

SEC. 4.—*Regulations to be observed on complete registration with limited liability.*—Every company that has obtained a certificate of complete registration with limited liability shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name

engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, cheques, orders for money, bills of parcels, invoices, receipts, letters, and other writings used in the transaction of the business of the company.

SEC. 5.—*Penalties to be inflicted for non-observance of such regulations.*—If such company do not paint or affix, and keep painted or affixed, its name, in the manner aforesaid, each of the directors thereof shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed; and if any director or other officer of the company, or any person on its behalf, use any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issue or authorise the issue of any notice, advertisement, or other official publication of such company, or of any bill of exchange, promissory note, cheque, order for money, bill of parcels, invoice, receipt, letter, and other writing used in the transaction of the business of the company, wherein its name is not mentioned in the manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money, for the amount thereof, unless the same shall be duly paid by the company.

SEC. 6.—*Every increase in the nominal capital to be registered, under a penalty.*—No increase to be made in the nominal capital of any company that has obtained a certificate of complete registration with limited liability shall be advertised or otherwise treated as part of the capital of such company, until it has been registered with the registrar of joint stock companies; and no such registration shall be made unless a deed is produced to the registrar, executed by shareholders holding shares of the nominal value of not less than ten pounds to the amount in the aggregate of at least three-fourths of the proposed increased capital of the company, nor unless it is proved to the registrar, by such acknowledgment and declaration as hereinafter mentioned, that upon each of such shares there has been paid up by the holder thereof an amount of not less than twenty pounds per centum; and if any such increase of capital as aforesaid be advertised or otherwise treated as part of the capital of the company before the same has been so registered, every director of such company shall incur a penalty of fifty pounds; and the payment of the above per centage shall be acknowledged in or endorsed on the deed so produced, and the fact of the same having been *bonâ fide* so paid

shall be verified by a declaration of the directors, or any two of them, made in pursuance of the said act made in the sixth year of the reign of his late Majesty King William the Fourth, cap. 62.

SEC. 7.—*Members of certificated companies to be free from personal liability.*—The members of a joint-stock company which has so obtained a certificate of complete registration with limited liability, after such certificate is granted, notwithstanding the provisions contained in the said act of the eighth year of her present Majesty, shall not be liable under any judgment, decree, or order which shall be obtained against such company, or for any debt or engagement of such company, further or otherwise than is hereinafter provided.

SEC. 8.—*Effect of execution against company.*—If an execution, sequestration, or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy or enforce such execution, sequestration, or other process, then such execution, sequestration, or other process may be issued against any of the shareholders to the extent of the portions of their shares respectively in the capital of the company not then paid up, but no shareholder shall be liable to pay in satisfaction of any one or more such execution, sequestration, or other process a greater sum than shall be equal to the portion of his shares not paid up: provided always, that no such execution shall issue against any shareholder except upon an order of the court, or of a judge of the court, in which the action, suit, or other proceeding shall have been brought or instituted, and such court or judge may order execution to issue accordingly, with the reasonable costs of such application and execution, to be taxed by a master of the said court; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee.

SEC. 9.—*If dividends be made and corporation insolvent, each director consenting thereto liable.*—If the directors of any such company shall declare and pay any dividend when the company is known by them to be insolvent, or any dividend the payment of which would to their knowledge render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter contracted, so long as they shall respectively continue in office; provided that the amount for which they shall all be so liable shall not exceed the amount of such dividend, and that if any of the directors shall be absent at the time of

making the dividend, or shall object thereto, and shall file their objection in writing with the clerk of the company they shall be exempted from the said liability.

SEC. 10.—*Notes of shareholders not receivable in payment of calls; liability of each officer consenting to a loan to shareholders.*—No note or obligation given by any shareholder to the company whereof he is a shareholder, whether secured by any pledge or otherwise, shall be considered as payment of any money due from him on any share held by him, and no loan of money shall be made by any such company to any shareholder therein; and if any such loan shall be made to a shareholder, the directors who shall make it, or who shall assent thereto, shall be jointly and severally liable to the extent of such loan and interest, for all the debts of the company contracted before the repayment of the sum so lent.

SEC. 11.—*Rights of creditors of existing companies preserved.*—Where any company completely registered under the said act of the eighth year of her present Majesty, or any company constituted under any act of Parliament, shall obtain a certificate of complete registration with limited liability, the grant of such certificate shall not prejudice or affect any right which previously to the grant of such certificate has accrued to any creditor or other person against the company in its corporate capacity, or against any person then being or having been a member of such company, but every such creditor or other person shall be entitled to all such remedies against the company in its corporate capacity, and against every person then being or having been a member of such company, as he would have been entitled to in case such certificate had not been obtained.

SEC. 12.—*Change in the name of a company under the act not to affect the rights of the company or other parties.*—No alteration made by virtue of this act in the name of any company shall prejudice or affect any right which previously to such alteration has accrued to such company as against any other company or person, or which has accrued to any other company or person as against such company, but every such company as against any other company or person, and every other company or person as against such company and the members thereof, shall be entitled to all such remedies as they or he would have been entitled to if no such alteration had been made; and no such alteration shall abate or render defective any legal proceeding pending at the time when such alteration is made.

SEC. 13.—*Companies to be dissolved and wound up when three-fourths of the capital lost.*—In the case of any company which has obtained a certificate of limited liability, whenever, on taking the yearly accounts of such

company, or by any report of the auditors thereof, it appears that three fourths of the subscribed capital stock of the company has been lost, or has become unavailable in the course of trade, from the insolvency of shareholders, or from any other cause, the trading and business of such company shall forthwith cease, or shall be carried on for the sole purpose of winding up its affairs; and the directors of such company shall forthwith take proper steps for the dissolution of such company, and for the winding up of its affairs, either by petition to the Court of Chancery, or by exercise of the powers of the deed of settlement, or by such other lawful course as they may think most fit.

SEC. 14.—*Auditors to be appointed subject to approval of board of trade.*—In cases where a certificate of registration with limited liability has been obtained, when one auditor only shall have been appointed under the thirty-eighth section of the act of the eighth of Victoria, cap. 110, that single auditor, and when two or more such auditors shall have been so appointed then one of such auditors, shall be subject to the approval of the board of trade, and such board in case the auditor submitted to them for approval shall for any reason appear unfit or objectionable shall appoint another in his place.

SEC. 15.—*Recovery of Penalties.*—Every pecuniary penalty imposed in pursuance of this act shall be deemed a debt due to the Crown, and shall be recoverable accordingly.

SEC. 16.—*Act to be taken as part of 7 & 8 Vic. c. 110.*—This act shall, so far as is consistent with the contents and subject matter thereof, be taken as part of and construed with the said act of the eighth year of her present Majesty, cap. 110, and the act of the eleventh year of her Majesty, cap. 78, and all the provisions of the said acts, save in so far as they are varied by this act, shall apply to persons and companies applying for or obtaining a certificate of complete registration with limited liability.

SEC. 17.—*Provisions of 7 & 8 Vic. c. 111., 11 & 12 Vic. c. 45., and 12 & 13 Vic. c. 108. to apply to this act.*—The provisions of the act of the eighth year of her present Majesty, cap. 111, and of the joint stock companies winding-up act, 1848, and of the joint stock companies winding-up amendment act, 1849, shall apply to persons and companies obtaining a certificate of complete registration with limited liability, subject only to such variations as may be occasioned by the provisions of this act.

SEC. 18.—*Act not to apply to Scotland.*—This act shall not apply to Scotland.

SEC. 19.—*Short title.*—This act may be cited for all purposes as "The Limited Liability Act, 1855,"

NUISANCES REMOVAL ACT (18 & 19 Vic. c. 121.)

The above act respecting the summary removal and abatement of nuisances has superseded the previous acts. Its provisions are as follow:—

1. Any premises in such a state as to be a nuisance or injurious to health may be ordered by two justices in petty sessions, or by a stipendiary magistrate, to be made safe and habitable, to be paved, cleaned, white-washed, disinfected, or purified, and sufficient private accommodation, means of drainage and ventilation to be provided; and while any house or building is rendered by a nuisance unfit for human habitation, in the opinion of the justices, the using of it for that purpose may be prohibited.

2. Any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit, so foul as to be a nuisance or injurious to health, may be ordered to be drained, emptied, cleansed, filled up, amended, or removed, and a substitute provided.

3. Any animal so kept as to be a nuisance or injurious to health may be ordered to be kept in a cleanly and wholesome state, and, if that be impossible, the animal may be removed.

4. Any accumulation or deposit which is a nuisance or injurious to health may be ordered to be carried away.

Notice of a nuisance may be given by any person aggrieved thereby, or by any of the following persons: The sanitary inspector or any paid officer under the local authority, two or more inhabitant householders of the parish or place to which the notice relates, the relieving officer of the union or parish, any constable or any officer of the constabulary or police force of the district or place, and in case the premises be a common lodging-house, any person appointed for the inspection of common lodging houses.

The notice is to be given to one of the local authorities in the following list, and, if more than one of them have jurisdiction in the place where the nuisance arises, the authority first mentioned is the one to which the notice must be addressed:—

1. Where the Public Health Act is in force, the local Board of Health.

2. In corporate towns (except the city of London, Oxford, and Cambridge), the Town Council.

3. In the City of London, the Commissioners of Sewers; and in Oxford and Cambridge, the Improvement Commissioners.

4. Where local improvement acts are in force the commissioners or trustees for the execution of such acts.

5. The Highway Board, if there be one.

6. The Nuisance Removal Committee, which ought to be chosen by the vestry under the act of 1855;

where none of the above mentioned authorities exist.

7. The Board of Inspections for lighting and Watching, under 3 & 4 William IV., c. 90, acting with the surveyors of highways.

8. Where none of the above mentioned are to be found, the guardians and overseers of the poor and surveyors of the highways in and for the place.

In the metropolis the vestries and district boards to be elected under the Metropolis Local Management Act will, on and after the 1st of January, 1856, be the authority to whom notice and complaints must be addressed.

The local authorities are bound to appoint or join with other local authorities in appointing a sanitary inspector, and they have power of entry into the premises on which the alleged nuisance is situated for themselves or their officers, and, on being satisfied that the complaint is well founded, are bound to bring it before a justice, on whose summons the person causing the nuisance, or, if he cannot be found or ascertained, the owner or occupier of the premises where it exists, will be summoned before two justices, by whom the complaint will be inquired into, and an order made. Even if the particular nuisance complained of have been removed before proceedings are taken the local authority, if they have reasons for believing that it is likely to recur may summon the offender, and the justices may in such a case make an order not for abatement but for prohibition, or they may combine an order, for abatement, with an order for prohibition, and direct the works necessary to prevent a recurrence of the cause of complaint. The order of the justices may extend to structural works, but in that case the act gives an appeal, as it does against any order of prohibition.

The duty and cost of removing the nuisance are thrown in the first place on the person causing it, and, if he cannot be found, on the owner or occupier in the next place, according as the nuisance is one caused by act or default of one or the other.

It is obvious that there are nuisances which no attention on an occupier's part can prevent, if an owner have not provided certain appliances; and, on the other hand, nuisances for the prevention of which the utmost care or forethought of an owner is unavailing, if the occupier be careless or perverse.

When neither the person causing the nuisance, the owner, nor the occupier can be got at, the duty of removing the nuisance devolves on the local authority, and the cost must be defrayed out of the funds administered by them.

Any person not obeying an order for abatement of a nuisance is liable to a penalty of not more than 10s. per day during his default; and any person knowingly and wilfully acting contrary to the order

of prohibition is liable to a penalty of not more than 20s. per day during such contrary action; and the local authority may themselves remove or abate the nuisance, and charge the cost to the person on whom the order has been made.

Meat, vegetables, flour, &c., exposed for sale, or in their way to, or in the course of being slaughtered, dressed, or prepared for sale or use, or landed from any ship, may be examined by the sanitary inspector, and, if they appear to him unfit for human food, may be seized and brought before a justice, who may make order therein.

The local authorities may direct complaint to be made before justices of nuisances arising from noxious trades or manufactures, and of any house which is so overcrowded by inhabitants, consisting of more than one family, as to be dangerous or prejudicial to their health.

The local authority may lay down and keep in repair a sewer or other structure along the course of any ditch, gutter, drain, or watercourse used, or partly used, for the conveyance of sewage, and may assess parties using the ditch as a means of sewerage to the expense, either in one sum, or by instalments, or an annual payment.

All persons allowing gas washing to flow into any place for water are rendered liable to heavy penalties. The local authority may direct any proceedings at law or in equity in cases coming within the power of this act.

JOINT-STOCK COMPANIES.—A report from the Registrar of Joint-stock Companies to the Lords of the Committee of Privy Council for Trade shows that, in 1854, 239 joint-stock companies were provisionally, and 132 completely registered. No application had been made for the enforcement of penalties for failure to register. The total amount of fees received for registration at the head office in London was £5,251 and at the branch office in Dublin £182. Of the number of companies completely registered in 1854, 36 were assurance companies, 1 a railway company, 1 a company for subsidiary purposes connected with railroads, 35 gas companies, 6 other companies for public works, 16 mining and quarrying companies (at home and abroad); 10 companies for conducting manufactures, working patent inventions, &c., 2 shipping and navigation companies, 5 trading companies, 13 public building companies, and 7 miscellaneous companies. A large list of companies is returned as having made no return of the appointment of auditors. No prosecutions for offences took place in 1854. As regards the bankruptcy of companies, the Registrar possesses no information from which he could make a return.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ASSENT TO BEQUEST.—*Effect of, where bequests over in trust for others—Character of executor lost by assent.*—The effect of an assent by executors to a bequest is to divest the property out of them as such, and, if they be trustees, to vest in them in the latter character, or, if the bequest be beneficially to a person directly, then in the latter. A bequest of leasehold was made to A. for life, remainder to B., remainder to C. Upon a bill filed by the executors after the death of A., alleging that they had assented to the bequest to A., and praying a declaration of rights, and that the leaseholds might be sold: Held, that B. took for life only. The decree went on to declare that C. took for life, with remainder amongst her children absolutely; and upon further consideration, a sale having been directed, the estate had been put up for sale, but objections to the title having been taken by the purchaser: Held, that the executors, by their assent to the bequest to A., had divested themselves of all right to hold the property as executors, and that the purchaser was not bound to accept the title in its present state in the absence of any concurrence by the infant children of C., the executors not having by their bill asserted any necessity for a sale in order to raise the charges upon the estate. *Lonsdale v. Berchtoldt*, Week. Rep. 1854-5, p. 651.

CHARGE.—*Paying off and keeping alive.*—No part of the doctrine of equity is of more importance than that which relates to the keeping alive of charges, which, having been created for particular objects, and to be satisfied out of the land, afterwards are satisfied by the creator out of his personal assets, and are then attempted to be kept alive for his own benefit. The fact of the settlor paying off a charge on the lands out of his own monies, if there be no indication to the contrary, is a satisfaction of it for the benefit of the parties entitled to the land, but if the settlor paying off the charge executes a deed declaring that the property shall be a security for his advance, and to be taken as part of his personal estate, he puts himself in the position of a mortgagee, and the money becomes a part of his personal estate, and to be dealt with as such. This will explain the following decision:—By a settlement a father had charged a sum of £5,000 owing by him to his sister, Anne Stein, upon the estate, and, subject thereto, had settled the estate upon himself for life, and then upon his daughter and her issue. He subsequently paid off the charge, and a deed was

executed by the settlor and the trustees of the settlement, by which it was declared that the trustees should hold the property to secure payment of the said £5,000 to the settlor, as part of his personal estate, as it was secured by the settlement to the said Anne Stein: Held, that the settlor had power to keep alive the charge, and that the charge was still subsisting, and passed under a residuary bequest contained in the will of the settlor. *Jameson v. Stein*, 25 Law Tim. Rep. 800.

CHARITY.—*Evidence—Estoppel—Commission to ascertain boundaries.*—Land had been anciently conveyed to the churchwardens and overseers of a parish for the benefit of the church and poor thereof. In 1636 the land was lying intermixed with the R. estate, the owner of which, by agreement, acknowledged this fact, and promised to pay £6 annually as a full rent and satisfaction, and further promised to set out sufficient land of a better value, which he should "either mortgage for the payment of the said rent, or otherwise assure and convey" to feoffees in trust for the parish. No trace of any such conveyance or exchange is in existence, but the parish books contain continuous entries of annual payment by the successive owners of the R. estate of £6 "for rent in respect of parish land" down to the present time. The R. estate had been subdivided in the course of time, thirty-one acres and a house included in the portion occupied by L. S., the present defendant, having been from 1786 alone subject to this annual payment, which appeared upon his title-deeds in the nature of a rent charge. The receipts taken by L. S. and his father, who had purchased the property in 1842, were expressed to be "for rent in respect of parish land." An information having been filed at the relation of the churchwardens and overseers seeking a declaration that the said land lying intermixed with the R. estate was subject to a charitable trust for the benefit of the parish, and praying a commission to inquire and set forth the land in the possession of the defendant, which was subject to this trust, and a conveyance of the same or land of equal value: Held, first, that upon the agreement of 1636, and evidence afforded by the entries in the parish books, a tenancy from year to year by the successive owners of the R. estate of these lands from the parish had been conclusively established. 2nd. that the parish were not precluded by the successive changes of ownership, or by want of privity, from having a commission to ascertain and set out these lands, or lands of equal value. 3rd. That the acceptance by the defendant and his immediate predecessor of the receipts "for rent in respect of parish land" was a conclusive admission by them of, a tenancy, and estopped them from denying the right of the parish. 4th. That the transaction of 1786,

when the estate was divided, and the annual payment treated as a rent-charge thrown upon one portion only of the estate, did not bind the parish, who were not parties to the arrangement. *Attorney General v. Stephens*, Week. Rep. 1854-5, p. 649.

COSTS.—*Security for costs* [vol. 1, pp. 60, 204].—*Leaving residence after filing bill.*—The plaintiff, a labourer, had left his house for three months, and locked up his furniture in it shortly after filing his bill, which he had recently amended, after paying the costs of an allowed demurrer (the terms upon which leave had been given to amend). The defendant having been unable to find the plaintiff for the purpose of getting the costs which he was liable to pay to them in respect of an action at law instituted by him prior to filing the bill, moved that the plaintiff be compelled to give security for costs in the suit: Held, following *Hurst v. Padwick*, 12 Jur. 21, and upon the circumstance that the costs of the demurrer had been paid, that the defendants were not entitled to security for costs. *Masby v. Bewicke*, Week. Rep. 1854-5, p. 646.

EXECUTOR.—*Right of retainer—Profits of carrying on business.*—The testator carrying on trade in partnership, and, being indebted to the partnership, appoints his partner executor. The executor continues to employ the ships in which the testator had an interest, and dies after the institution of a creditor's suit for the administration of the testator's estate: Held, that the executor had a right to retain against the testator's debt all profits made during his (the executor's) life, notwithstanding the institution of the suit. *Thornton v. Stokill*, 1 Jur. N. S. 751.

FEME COVERT.—*Reversionary interests of proceeds of lands directed to be sold—Conveyance by acknowledged deed under 3 & 4 Will. 4, c. 74* [vol. 1, pp. i, 150, 264, 298, 339, 372, 447].—We have frequently mentioned the decision of V. C. Knight Bruce in *Hobby v. Allen* (15 Jur. 835), to the effect that a feme covert cannot by an acknowledged deed pass her reversionary interest in the produce of unsold lands directed to be sold, and that V. C. Wood, in *Briggs v. Chamberlain* (Week. Rep. 1852-3, p. 346; 18 Jur. 56), had refused to follow this decision. And we have now to add to this dissent the decision of the Master of the Rolls, who has held that a conveyance by a married woman of her reversionary interest under a will, in the proceeds of land thereby directed to be sold, duly acknowledged under the 3 & 4 Will. 4, c. 74 (the Fines and Recoveries Abolition Act) is valid, considering the right to the proceeds of land directed to be sold as an equitable interest in the land. *Tuer v. Turner*, 25 Law Tim. Rep. 252; Week. Rep. 1854-5, p. 583.

MINES.—"Minerals," meaning of in an agreement to make partition—*Quarries and Mines—Limestone*

rock.—The following case is one of some importance so far as concerns those parts of the country where mining operations are carried on, as showing the construction the courts put on the terms "minerals," "mines," "quarries," &c. Several scientific witnesses were of opinion that the word "mineral" included "any crystalline or earthy substance, whether metalliferous or not, existing in and forming part of the substance of the earth, and which could be worked by means of a mine or quarry," a definition which included limestone. V. C. Kindersley mentioned the various senses in which the term "minerals" had been used by the parties in the agreement presently referred to, concluding that so far from there being any authority to show that by the word "minerals" must necessarily be intended "any rock or stone worked in any manner whatever," there was plain ground for quite an opposite conclusion: for inferring that a mine and quarry are by no means identical, and minerals not necessarily crystalline or earthy substances. An agreement for a partition deed excepted from its operation "the mines of lead and coal, and other mines or minerals within or under or belonging to the said lands and hereditaments only." A further deed directed a survey and valuation to be made and provided, that the "profits of the mines" should be taken between the parties according to their several estates, rights, and interests in the premises. Some limestone rock lay upon and near below the surface of a portion of the partitioned property: Held, that such limestone rock was not a "mineral" within the meaning of that word as used in the exception in the partition deed, a mineral being strictly a substance worked by means of a mine, underground, and not by a quarry on or near the surface of the earth. *Darvill v. Roper*, 25 Law Tim. Rep. 302.

MORTMAIN [vol. 1, pp. 10, 86, 412].—The 9 Geo. 2, c. 36 (commonly called the Mortmain Act) is to be construed as aimed at preventing, not dispositions in favour of charity, but inalienability of land consequent upon such dispositions. The statute does not avoid all dispositions of real property, but only requires certain observances, and it leaves it open to a person, having in his lifetime converted his property into pure personal estate, to dispose of it, when so converted, in charity to whatever extent he may see fit, and however much his kindred may be prejudiced by the disposition. In accordance with this doctrine, and furnishing an alarmingly easy method of defeating the provisions of the statute, it has been decided by the Court of Appeal that a man may, acting *bonâ fide*, and without an intention to evade the statute, make himself individually a debtor by specialty without valuable consideration, and for motives merely of benevolence and beneficence—i. e.,

for a charitable object, and payment of the debt so incurred may, on behalf of the charity, be enforced against the debtor and his *real* as well as his personal estate by the same means, to the same extent, and in the same manner as any other specialty debt fairly incurred but not founded on valuable consideration. In other words, a person may covenant that his executors shall pay for charitable purposes a given sum of money, and that covenant may be enforced. Thus, by an instrument under seal, a person covenanted that he within a year from the date, or his executors within a year from his death, subject to his debts and the legacies to be given by his will, would invest a sum of money in the name of the covenantees upon a charitable trust. The instrument was not executed by, nor communicated to, the covenantees. The covenantor did not perform the covenant in his lifetime: Held, that the instrument was valid as a deed, that it was not void under the Mortmain Act, and it created a fund payable out of chattels real as well as pure personalty, the instrument neither charging, incumbering, nor conveying any property, real or personal, but merely entitling the covenantees to an action against the covenantor's executors for breach of covenant to invest the fund, in case of their neglect to make the investment. *Alexander v. Brame*, 25 Law Tim. Rep. 298.

MORTMAIN.—*Money bequeathed for charitable purposes—Scheme for purchasing land therewith, and for building almshouses.*—In the case of Attorney-General v. Wilson (25 Law Tim. Rep. 802), where there was a surplus of rents and profits of real estate devised to charitable purposes, it was held that the heir-at-law could not claim such surplus. Following this decision, where a testator bequeathed stock to a charity for charitable purposes, the fund increased considerably, and a scheme was prepared, by which part of the increased property was directed to be laid out in land, and the building of almshouses thereon: Held, that such scheme was not contrary to the statutes of mortmain, and the court approved thereof accordingly. *In re Honnor's Trust*, 25 Law Tim. Rep. 801.

PARENT AND CHILD.—*Undue influence—Delay and acquiescence.*—Courts of equity look with great jealousy upon all gifts from a child to its parent, who is also the guardian of the child's property, and will require the person accepting such gift to show plainly and distinctly that it was the free and spontaneous act of the child, who had a perfect understanding of the transaction. Although such a transaction would have been set aside if a suit had been instituted shortly afterwards, acquiescence for more than ten years, and a course of dealing confirming and recognising the transaction sought to be impeached, will preclude the parties complaining

from obtaining relief in equity in respect of such transaction. *Wright v. Vanderplank*, Week. Rep. 1854-5, p. 637.

POWER.—*"Elder and younger."*—A deed of entail contained a power to make provision for younger children other than the child who should take the estate; but one of the tenants in tail had only a life interest given him by the entail, the estate on his death passing away from his children to another set of heirs: Held that *elder and younger* were correlative terms; and that as none of the children could take the estate, so none of them could be the objects of the power. *Dickson v. Dickson*, 1 Macq. Scot. App. Cas., 729.

PUBLIC COMPANIES.—*Lands Clauses Consolidation Act, 1845, s. 69—Charitable Trusts Act, 1853 [vol. 1, pp. 90, 389]—Certificate of commissioners—Enfranchising copyholds.*—A petition under the Lands Clauses Consolidation Act, 1845, s. 49, for the application in the purchase of land of the purchase money paid in respect of charity land taken by a company will be entertained without the certificate of the charity commissioners. The Lands Clauses Consolidation Act, 1845, s. 69, authorises the application of the purchase money paid in respect of freehold land taken by a company in the enfranchisement of copyhold land settled upon the same trusts. *In re Cheshunt College*, Week. Rep. 1854-5, p. 638.

REPRESENTATION.—*As to property settled on child about to be married—Husband induced to make settlement on faith of representation.*—The following decision will be better understood by referring to some remarks and cases in vol. 1, pp. 374, 408, 447, from which it will appear that courts of equity compel persons to make good their representations which they have induced others to believe, and who have accordingly acted on the faith of those representations—a doctrine which the Master of the Rolls declared no one could feel more strongly than he did the necessity for enforcing, holding it to be one of the most valuable principles which courts of equity administer. Still, the burthen of proof of the representation lies on the party alleging it to have been made, and the following case is an instance of a failure to make out the representation. Where a lady, and her intended husband, in 1852, wrote to the father of the lady, announcing their engagement, and asking his consent to the marriage, and the gentleman also stated what settlement he proposed to make on the lady, and asked the father what settlement he would make on his daughter, and the father wrote in reply to the daughter a letter which was to be shown to the intended husband, stating that he neither assented nor dissented from the marriage, and that he could do nothing more for his daughter

than he had done, and that he had settled on her the Wrazall estate, which was of the value of about £40,000, he having, in fact, made a settlement of his estate on his daughter, subject to a charge of £5,000 thereon, but the letter had been destroyed, and the only proof of its contents was by the affidavits of the lady and her husband, and of another gentleman and his wife, to whom the letter had been shown: Held, that the onus of proof lying on the husband and wife, the evidence did not establish the fact of such a representation having been made, on the faith of which the marriage took place. *Jameson v. Stein*, 25 Law Tim. Rep. 300.

TRUSTEE.—*Improper investment—Cestui que trust's right to follow the fund—Proving against trustee's estate for deficiency.*—Where a trustee states in writing to his cestui que trust that part of the trust monies are laid out in a certain property, although not an investment warranted by the terms of the trust, and although the cestui que trust goes on receiving interest, and not the rents: Held, that the cestui que trust might at his option take the property in which the trust funds had been laid out, as representing the whole trust fund, or might have it sold, and prove if necessary against the trustee's estate for the deficiency (if any). But the cestui que trust was not allowed to take the property as representing the actual portion of the trust fund laid out by the trustee, and prove for the balance. *Thornton v. Stokill*, 1 Jur. N. S. 751.

TRUSTEE.—*Discretion—Maintenance—Filing bill does not take away discretion.*—Testator empowered trustees at their discretion to pay during the life of his wife a moiety of the income of the trust funds for or towards the maintenance or education of his daughter, or otherwise for her benefit: Held, that the trustees had not deprived themselves of this discretionary power by filing a bill to administer their testator's estate. *Sillibourne v. Newport*, Week. Rep. 1854-5, p. 683.

WARD OF COURT [vol. 1, pp. 124, 200, 204, 296, 298, 376].—*Marriage immediately after majority—Rectification of improper settlement* [vol. 1, p. 272].—Our references will show how frequently the subject of wardship of court engages the attention of courts of equity, and the following case will show that such courts do not cease to throw their protection around the ward immediately on her arriving at full age. It is indeed a very common notion that when a ward of court comes of age and marries, his or her property must go according to the settlement of it which the ward may then make. The cases of *Long v. Long* (2 Sim. and Stu. 119) and *Austen v. Halsey* (*Id.* 123, n.) show that if the ward be examined as she ought to be on any petition being presented respecting her property

and the settlement of it, and the judge take care that she fully understands the nature of the settlement, and what she is doing,—that she is, in fact, then settling all she has, or may have, coming to her. And if she then chooses so to do, and says she fully knows what she is about, the court will take her consent, and a settlement made thereupon will be upheld. But if this be not done, although the omission to examine her on the petition arise from no evil intention, the settlement cannot stand. The above two cases show moreover that the courts retain a certain degree of control over the property of a ward of court, even after majority, that is, when the property is within its jurisdiction. The above observations will explain the following decision. The master refused his assent to proposals for the marriage settlement of a ward of court; the ward attained her majority, and then executed a settlement in accordance with the proposals which the master had rejected; the ward then joined in a consent petition at the Rolls, with her husband and the trustees as co-petitioners, such petition fulling stating the settlement, but her consent was not taken to the order made by the Master of the Rolls. On a bill filed in 1851 to set aside or rectify the settlement, on the ground that its provisions were inequitable: that the ward was ignorant of the nature of the settlement, and that it was, in fact, the settlement of her mother, it was held, that notwithstanding the ward's majority when she executed it, and notwithstanding the order on the consent petition at the Rolls, the settlement might be rectified. *Money v. Money*, 25 Law Tim. Rep. 294.

WILL.—*Construction—House and premises.*—Testator took a conveyance of "all that messuage, or tenement, garden, fold, yard, and premises called the Upper House Farm, with the barns, stables, cider mills, and outbuildings, containing one acre, three roods, one pole," together with other enumerated pieces of land, amounting to forty-one acres, which estate was ordinarily called the Upper House. By this will testator devised "all that my freehold house and premises called Upper House" upon certain trusts, and gave all the rest, residue, and remainder of his "said real and personal estates" over: Held, that the whole estate called Upper House, and not merely the house and garden, passed under the devise of "all that my freehold house and premises." *Ross v. Veal*, Week. Rep. 1854-5, p. 652.

EQUITY PRACTICE.

DISMISSAL OF BILL [vol. 1, pp. 91, 239, 355].—*Omission to give notice of filing replication.*—By the 23rd Gen. Order of the 26th Oct. 1842, notice of filing an answer is to be given on the same day to the plaintiff's solicitor. It has been decided

by V. C. Stuart that omission to give notice of the filing of the answer does not deprive the defendant of his right to move to dismiss the bill for want of prosecution, although the omission is matter of compensation in time, on a proper application in that behalf by the plaintiff. *Jones v. Jones*, Week. Rep. 1854-5, p. 638.

INFORMATION.—*Death of Relator—Substituting new relator.*—Where the relator dies after decree, an order for the substitution of a new relator, with liberty to him to carry on the proceedings, will be made on the application of the proposed new relator with the consent of the Attorney-General, but not on the application of the Attorney-General himself. *Attorney-General v. Harly*, Week. Rep. 1854-5, p. 636.

ISSUE AT LAW.—*Law and facts.*—In directing an issue for trial, a question of law is almost always involved. Thus, upon the issue whether A. is the son of B., the point will arise, What is a lawful marriage? Nevertheless the endeavour should be made to confine the issue as much as practicable to pure facts, and to exclude legal questions. As far as the nature of things permits, the English courts constantly separate facts from law. The Scotch courts ought to do likewise. *Melrose v. Hastie*, 1 Macq. Scot. App. Cas. 698.

REPLICATION.—*Notice of filing—Neglect to give on day of filing* [see *suprà*, "DISMISSAL OF BILL"].—Upon motion to take replication off the file for irregularity, replication having been filed the 21st June, and notice thereof not served on the defendant until the 25th July: Held, that the defendant was entitled to have the time for closing the evidence enlarged, as if replication had been filed upon the day on which notice had been served, but no costs given, the court not encouraging these summary applications upon a mere slip. *Lloyd v. Solicitors' and General Life Assurance Company and others*, Week. Rep. 1854-5, p. 640.

COMMON LAW.

ANNUITY.—53 Geo. 3, c. 141, s. 6—*Return of consideration—Payment of old debts*—[vol. 1, pp. 362—371, 377, 378].—The case of *Pennell v. Smith* stated *ante*, pp. 377, 378, as having been decided by the Master of the Rolls has been over-ruled, on appeal, by the Lord Chancellor. In the course of the argument on such appeal it was contended, on behalf of the defendant, that even admitting that a portion of the consideration money was returned, it was not in the power of a court of equity to grant relief in such a case as the present under the 6th section of the act (vol. 1, p. 363), but that such relief was only to be had by an action at law. The Lord Chancellor stated that during the argument on

this point he for a time felt some doubt, but he entertained none after consideration. When the Legislature used the word "action" in the above section it did not intend to confine its meaning to the technical sense so as to prevent parties coming into equity under annuity deeds which could only be enforced by courts of equity, and in such cases the Lord Chancellor thought courts of equity had the same power as courts of law to set aside deeds, and to order them to be delivered up to be cancelled, and that it was clear upon general principles that courts of equity must have power to give substantially the same relief as courts of law in cases where the relief sought is of a kind to be obtained, not by action, but in a court of equity. It will be seen by reference to vol. 1, p. 377, that part of the consideration money paid for the grant of an annuity was returned by the grantors to the grantee immediately after its payment; it was proved that the purchase money was paid to the grantors, who owed a *bond fide* debt to the grantee: Held, over-ruling the decision of the M. R. (*ante*, p. 377), that such a transaction was not within the 6th section of the stat. 53 Geo. 3, c. 41. The Lord Chancellor observed that the question upon the construction of that section was this: was the money stated to be the consideration for the granting of the annuity paid or not? When it is stated that the consideration was £750, if that sum, or any part of it, was paid for the purpose of being returned, or if it was pretended to be paid, and was not really so, then so far there was no consideration, and the transaction would be a colourable pretence within the 6th sect. But if it actually was paid, and there were debts due and owing by the grantors of the annuity, and they thought fit to apply the consideration money to the payment of these debts, the Lord Chancellor considered that would not be a return of the consideration money within the statute—not even though the grantors of the annuity had previously promised so to apply it, and the promise undoubtedly operated upon the mind of the grantee. His lordship said that he was therefore unable to arrive at the same conclusion as the M. R. All cases like the present turn very much upon questions of fact, and nothing is more likely than that different judges may differ in their deductions from the same facts; but he was bound to act upon his own view, and he certainly thought that the case made by the defendant was not unnatural. The M. R. was a good deal influenced by the fact of the two notes having got back so soon to Mr. Smith's possession, but the Chancellor said that that fact struck him as having a different aspect. *Pennell v. Smith*, 25 Law Tim. Rep. 291.

DEED.—*Construction—Intention of parties.*—In Courts of Justice the word "intention" means such

intention only as can be deduced from construction. Where the language of an instrument, though slovenly and inaccurate, shows what is meant, the Court will make the language bend to, and execute the intention. *Dickson v. Dickson*, 1 Macq. Scot. App. Cas. 729.

PATENT.—*Infringement* [vol. 1, p. 312].—*Use of the elements of a substance not the same as the use of the substance itself.*—In *Stevens v. Keating* (2 Phill. 883) Lord Cottenham granted an injunction against the use of a compound substance on the ground of its being an infringement of a patent granted for the use of its component parts. It appears, however, from the following case that the courts will not follow this decision in a converse case—*i. e.*, where a party uses the component parts of an article, which produce the same results. A patent had been obtained for the use of carburet of manganese in the manufacture of cast steel: Held (reversing the decision of the Court of Exchequer Chamber), that the use of the component parts of carburet of manganese, which was equally effectual with, and considerably cheaper than, the use of that substance itself, afforded no evidence to go to a jury of an infringement of the patent, although it was asserted by scientific witnesses that during the process these component parts combined, and formed carburet of manganese, and that the carburet, when so formed, afterwards combined, as in the patented process, to form the steel. *Unwin v. Heath*, Week. Rep. 1854-5, p. 625.

PUBLIC COMPANY.—*Joint-stock Companies' Registration Act*—7 & 8 Vic. c. 110, s. 24—10 & 11 Vic. c. 78, s. 7.—*Railway companies—Provisionally registering—Illegality.*—In *Young v. Smith* (15 M. and W. 121) it was held that the 26th section of the act of 7 & 8 Vic. c. 110, which prohibits the sale of shares before complete registration; does not apply to railway companies, and the same argument which was used in that case under the 26th section to show that such companies are not compelled to be completely registered was in the following case used to show with respect to the 24th sec. of that act that such companies need not be provisionally registered, for the 26th section, which imposes a penalty on persons disposing of shares in a joint-stock company before it has obtained a certificate of complete registration, follows immediately the 25th section, which confers powers on companies completely registered, expressly including those requiring an act of Parliament; and yet the Court of Exchequer, in *Young v. Smith*, said the words "joint-stock company" in the 26th section was to be construed by the 2nd section, which excepts from the act companies requiring the authority of Parliament, and it was further argued by counsel that therefore the 26th section did not apply to railway companies; but this argument was held

not to be correct by the Court of Exchequer. It should be stated that the 4th sec. of the 7 & 8 Vic. c. 110 enacts that "before proceeding to make public, whether by way of prospectus, &c.; any intention or proposal to form any company for any purpose within the meaning of this act, whether for executing any such work as aforesaid under the authority of Parliament, or for any other purpose," the promoters must provisionally register. All joint-stock companies are therefore *prima facie* to be provisionally registered. Then the 23rd sec. enacts that it shall be lawful for the promoters of companies provisionally registered (expressly including those for executing works by authority of Parliament) to do certain acts, "but not to make calls, or to purchase, contract for, or hold lands, nor to enter into any contract for any services." Then follows the 24th section in these words, "and be it enacted, that if, before a certificate of provisional registration shall obtained, the promoters, or any of them, or any person employed by or under them, advertise the existence or proposed formation of the company, or make any contract whatsoever for or in the name or on behalf of such intended company, then every such person shall be liable to forfeit for every such offence a sum not exceeding £25." The Court of Exchequer, distinguishing *Young v. Smith* as decided on sec. 26, which used the term any "joint-stock company," whilst sec. 24 has no such words, have held that railway companies requiring the authority of Parliament are equally with other joint-stock companies required to be provisionally registered under the 7 & 8 Vic. c. 110, for the 23rd sec. must be construed by reference to the 22nd sec., and be held applicable to all companies not provisionally registered, which, if so registered, would enjoy the privileges conferred by sec. 23, and all contracts made with the promoters on behalf of any such company before provisional registration are illegal, and cannot be enforced. Such a company is also within the 7th sec. of the 10 & 11 Vic. c. 78, which makes it illegal for the promoters of it, before it has obtained a certificate of complete registration, to issue a prospectus containing any of the particulars required to be returned to the registrar, under the 7 & 8 Vic. c. 110, or that act. *Abbott v. Rogers*, 1 Jur. N. S. 804.

SHIPPING.—*Collision—Sailing vessel and steamer—Negligence of both parties—Regulation of admiralty*—14 & 15 Vic. c. 79, s. 28.—*Plea, not guilty—Preponderance of blame—Finding of jury.*—According to the rule which prevails in the Court of Admiralty in the case of a collision, if both vessels are in fault, the loss is equally divided; but in a court of common law the plaintiff has no remedy, if his

negligence in any degree contributed to the accident. In some cases, however, there may have been negligence on the part of the plaintiff, remotely connected with the accident, and in these cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey case, *Davies v. Mann* (10 M. and W. 546). There, although without the negligence of the plaintiff the accident could not have happened, such negligence is not to be considered as having contributed to the accident within the rule upon this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely to be ascribed, he only proximately causing the loss. These principles were applied in the following decision of the Court of Queen's Bench:—The collision regulations of the admiralty impose a duty on "sailing vessels approaching or being approached by any other vessel to show a bright light in such a position as can be seen by such vessel, and in sufficient time to avoid the collision." By sec. 28 of stat. 15 & 16 Vic. c. 79, if a collision is occasioned by the non-observance of the rule to be made by the admiralty with respect to the exhibition of lights, the owner of the vessel by which such rule has been infringed shall not be entitled to recover recompence, unless the circumstances were such as to justify a departure from the rule. In an action by the owner of a collier against the owner of a steam vessel for injury done to the former in a collision by night; the jury, in answer to questions put to them by the judge, found, first, that there was fault on the part of the collier in not continuing the light until the danger was past; second, that the steamer was going at too great a speed on so dark a night, in which respect there was want of caution, but that it was impossible to avoid the accident when the steamer came within two or three collier's length; third, that the preponderance of blame was with the steamer: Held, that the jury must be taken to have found, by their first answer, that the negligence of the master in not complying with the admiralty regulation directly contributed to the accident, although there was negligence on the other side, and therefore, at common law and by sec. 28 of stat. 14 & 15 Vic. c. 79, there was a defence to the action, and that the first answer was not qualified by the second and third answers: Held, also, that sec. 28 of stat. 14 & 15 Vic. c. 79, might be taken advantage of under the plea of not guilty. *Dowell v. The General Steam Navigation Company*, 1 Jur. N. S. 800.

BANKRUPTCY AND INSOLVENCY.

ASSIGNEE OF INSOLVENT.—*Mortgagee—Special lien—Election.*—According to the following case, it is the practice of the Insolvent Court in Ireland never to appoint a creditor assignee who has a mortgage or other special lien, without relinquishing it, and coming in in common with the other creditors. Nevertheless it has been held that a creditor of an insolvent, who has an equitable mortgage or lien on a portion of his property, not being an ordinary mortgage or lien, does not waive his right to priority by having himself appointed assignee. Such appointment is not an election to come in rateably with other creditors. Acts may be done in pais that will amount to an election. *Re Murphy*, 25 Law Tim. Rep. 304.

DISPUTING BANKRUPTCY [1 Chron. 131, 153].—*Notice of, in suit in equity—Time and mode of giving notice—Consolidation Act, s. 235—Rejoinder in equity abolished* [see as to actions at law, 1 Chron. pp. 131, 132].—By sec. 233 certain very limited periods are given within which a bankrupt is to be at liberty to dispute his bankruptcy, after which the *Gazette* containing the adjudication is to be conclusive evidence in all cases as against such bankrupt, "and in all actions at law or suits in equity for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged a bankrupt." The time has, with respect to a bankrupt in the United Kingdom, been extended from three weeks to two calendar months ('*Law Chron.* p. 158; 17 & 18 Vic. c. 119, s. 24). By sec. 235 of the Consolidation Act, 1849, it is provided, "That in all suits in equity other than a suit brought by the assignees for any debt or demand for which the bankrupt might have sustained a suit in equity had he not been adjudged bankrupt, and whether at the suit of or against the assignees, no proof shall be required at the hearing of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively as against any of the parties in such suits, except such parties as shall within ten days after rejoinder give notice in writing to the assignees of their intention to dispute some and which of such matters and where such notice shall have been given, if the assignees shall prove the matter so disputed the costs occasioned by such notice shall, if the court shall see fit, be paid by the parties so giving such notice; and the serving of such notice may be proved by affidavit upon the hearing of the cause." We have elsewhere noticed the alip made by the legislature in speaking of a rejoinder in equity, that having been long since abolished. The following decision upon the above provision shows that a notice must be given

separately from the answer even where the latter expressly states that the defendant disputes the bankruptcy:—Lord H. having, in November, 1841, assigned and mortgaged the bulk of his property to H., goes abroad, and is made bankrupt in September, 1842. H. sells the assigned property for £6,000, it being valued at £12,000, and in 1852 the assignees file a bill to have the deeds of November, 1841, declared void, as part of a scheme to go abroad and withdraw all Lord H.'s property from his creditors. H. by his answer denies the scheme and the sale at an undervalue, and insists that the deeds were for good consideration, and disputing the bankruptcy contends that the assignees were bound to establish the bankruptcy as he disputed it by his answer, which was notice in writing under the 235th sec. of the 12 & 13 Vic. c. 106, which made it necessary to prove a bankruptcy against such parties as had given such notice ten days before rejoinder in a suit by the assignees for a debt for which the bankrupt might have sustained a suit, the plaintiffs insisting that rejoinder no longer existed: Held, that the disputing the bankruptcy by the answer was not such a notice as the act required, that rejoinder under the new practice was when the cause was at issue, and that by reason of the delay and the loose nature of the evidence the deeds could not be set aside, but an account was directed as to one matter. *Pennell v. Hume*, Week. Rep. 1854-5, p. 585.

FRAUD.—*Dismissal of petition for—Filing of second petition—Same debts.*—An insolvent, having petitioned the court, had been remanded for eighteen months; five years after he petitioned under the protection acts, and as it appeared that the debt of creditor No. 1 was fraudulently contracted, his petition was dismissed. A second petition being filed for protection against the same debts, the court dismissed the second petition and made order that another should not be filed but by order of the court. *Re Alfred Thomas Batchelor*, 25 Law Tim. Rep. 248.

INDIVIDUAL PREFERENCE.—*Contracting debts in trade without reasonable expectation of payment.*—Where an insolvent debtor having been committed to prison, one creditor goes behind the back of the rest and endeavours, under condition of foregoing his opposition, to obtain from the insolvent an advantage for himself: Held, that it is no ground for refusing to hear him as a witness. "If I refused to hear him," said the Chief Commissioner Law, "he would be quite right in applying for a mandamus to compel me to do so." *Re Charles Watt*, 25 Law Tim. Rep. 248.

RECKLESS TRADING.—*Allocation of salary of public officer on active duty—Suspension arrears.*—

Where a bankrupt calls his creditors together at a time when his assets will pay ten or twelve shillings in the pound, and where he has lost his own capital, he cannot be accused of reckless trading. The court will not allocate the salary of an officer engaged in the public service, and it has no control over suspension arrears which will not be paid unless the certificate is granted. *Re Richard Smith*, 25 Law Tim. Rep. p. 237.

DEBATING SOCIETIES.

THE LAW STUDENTS' MUTUAL CORRESPONDING SOCIETY.

Established for the Promotion of a regular System of Intercommunication between Students residing in all parts of the Kingdom.

The following is the Second Annual Report of the Committee, presented to the Members 9th April, 1855. The committee in laying before the members their second annual report, have great satisfaction in calling their attention to the complete success that has attended the operations of the society during the preceding twelve months, and they again congratulate them upon the permanent establishment of a system of intercommunication which cannot fail to be productive of very great benefits to the law students of this Kingdom.

The society now consists of upwards of fifty ordinary members and the number is steadily increasing, a convincing proof of the readiness of articulated clerks to avail themselves of such an advantageous means of self-improvement as this society affords to its members.

Your committee have also the pleasing intelligence to announce that the suggestions contained in their last report, that an appeal should be made to the members of the legal profession, soliciting their support to this society in the capacity of honorary members, has met with a response, and as your committee feel convinced that nothing will so much tend to place the society in a prominent and permanent position, and at the same time gain for it the confidence of articulated clerks as the fact of its having the approbation and support of their seniors, they again appeal to the profession soliciting their countenance and co-operation by becoming honorary members of the society.

The knowledge of the existence of this society has during the preceding year been very considerably increased as instanced by numerous students residing in districts where the society was previously unknown, having been enrolled as members and your committee in announcing with gratification the fact that its advantages are now extended over

twenty-five counties in England and Wales, trust that this announcement will tend to convince law students that the society is really obtaining the confidence of their fellows and is well worthy of their attention and support.

Your committee deem it advisable to draw the attention of those articulated clerks who are not at present aware of the existence of the society, to its principal features and objects. It is designed, first—as a means of friendly intercourse and for the purpose of engendering feelings of unanimity and friendship amongst articulated clerks generally, throughout the Kingdom; secondly—to supply the wants of a debating society in small towns by affording a medium for the written discussion of Moot Points on legal subjects, and the compositions of essays; and thirdly—by the same means, to furnish opportunities to the student to apply principles to practice, and thus assist him in obtaining a practical knowledge of his profession, and your committee feel justified in asserting that every member who, actuated with an earnest desire for self-improvement, will give his full attention to the papers of the society cannot fail to acquire an extensive and varied knowledge of the law.

With regard to the financial position of the society, your committee feel pleasure in stating that after repaying the balance due to the Secretary in April last, and defraying all the expenses of the past year, a surplus remains to the credit of the society.

CHARLES R. GILMAN, Hon. Sec.

Norwich, August, 1855.

BIRMINGHAM LAW STUDENTS' SOCIETY.

A person, not being a solicitor, agrees verbally to sell an estate. The purchaser's solicitor sends to the vendor the draft of an agreement, at the foot whereof the latter writes: "I approve of this," and signs his name. Is this a binding contract under the Statute against Frauds?

A verbal agreement having been entered into between the vendor and purchaser, the question involved in the discussion was whether the subsequent signature by the vendor of an approval written at the foot of a draft containing the terms of the previous verbal agreement was sufficient to bind him, or whether the draft so signed was to be considered as merely evidence of something he intended to agree to, and as leaving him a *locus penitentiae* until he should sign a fair copy. Where no previous verbal agreement has been made it would probably be a question in each particular case whether the signature of such an approval was intended to be an approval of the draft merely as such, or whether it was intended to give it validity as an agreement

(Sugden's Concise View, 93). In *Doe v. Pedgriph* (4 C. and P. 312), Lord Tenterden held that a memorandum indorsed on the back of a draft agreement in the following words: "We approve of the within draft," and signed by both parties, did not import an agreement, but was merely evidence of something intended to be agreed to, but it was contended that probably Lord Tenterden was in some measure influenced in giving his decision by the fact that the defence in the particular case was an unconscionable one, and must have prevailed had the decision been different. This case appears, however, to have little bearing where a previous verbal agreement has been made, and this will be seen more clearly on a consideration of the Statute of Frauds. The fourth section provides that no action shall be brought on an agreement relating to lands unless there be evidence thereof in writing signed by the party to be charged, but does not provide that the action is to be brought on the writing itself; and in fact, in declaring on an agreement not under seal, it is never stated to be in writing, but that is left to be proved by the evidence. Consequently it would appear to be unnecessary to inquire with what intention a person signed an approval such as that stated in the question; the mere fact of his having recognised in the manner required by the statute the previous verbal agreement would be sufficient to bind him, and in support of this view the following cases may be referred to: *Hawkins v. Holmes* (1 P. Wms. 770) where the defendant had altered a draft conveyance with his own hand, but had not actually signed it, Lord Macclesfield held that the statute had not been complied with; but the inference may fairly be drawn from that case that had the defendant actually signed the draft he would have been bound, irrespectively of any question of intention. In *Shippey v. Denison* (5 Esp. 190), where a draft contained all the terms of an agreement for a lease, and the intended lessee wrote on the draft and signed a memorandum requesting the lessor to relet the premises, as it would be inconvenient for him to perform his agreement for them, it was held by Lord Ellenborough that the case was taken out of the statute, he observing: "It is not necessary that the note in writing to be binding under the statute should be contemporary with the agreement. It is sufficient if it has been made and adopted by the party afterwards, and then anything under the hand of the party expressing that he had entered into the agreement will satisfy the statute, which was only intended to protect persons from having parol agreements imposed on them." See also *Thornbury v. Beville* (1 Y. and C. C. C. 554). The meeting decided almost unanimously in the affirmative.

S. BALDEN, Jun., *Pro. Sec.*

A SOLICITOR'S LIBRARY.

(Continued from p. 24)*

Crabb's Digest.—Crabb's work is a digest of the law of real property in its present state, and as its price is £2 18s., and may be purchased second-hand for less than half that amount, those who think Cruise too expensive will perhaps find it sufficient. It has the advantage of being of recent date, namely, 1845. We do not wish it to be thought that we recommend very strongly Mr. Crabb's Digest, for we really do not think it displays much ability or learning.

Chitty's Index.—The work of Mr. Chitty is an index to all the common law reports relating to conveyancing and bankruptcy from 1558 to 1840. It is by Messrs. Chitty and Forster. It may be purchased second-hand for about ten shillings, and will be found useful to some extent. It is, however, a mere collection of marginal notes, and is not to be compared with Cruise or even Crabb.

Harrison's Digest.—We now come to the common law digests, and shall speak first of Harrison's Digest of Decisions in the Courts of Law and Bankruptcy from 1756 to 1843. There are 4 vols. 3rd edition, 1844, price £6 16s. 6d. The work also includes some equity cases. The chief merits of the work are its excellent arrangement and completeness, but there is no information afforded except what is contained in the marginal abstracts of the cases from the reports. Earlier conditions can be had very cheap; a supplement is announced as in preparation, bringing down the cases to 1854, which will add to the utility of the work.

Petersdorff's Abridgment.—The next work is that of Mr. Petersdorff. In fact there are two works. The first is an Abridgment of Cases at Common Law from 1662 to publication—i. e., from 1825–1830. This work has been much depreciated, but in our opinion it is a very useful one, and as it may now be obtained very cheap (about £3), we should certainly recommend its purchase. The author's second work is in fact a continuation of the preceding one, being an Abridgment of the Common Law as altered and established by the recent statutes, rules of court, and decisions. It contains the statutes from 1824 to 1840. There are five vols., price £7 17s. 6d. It may, however, be purchased for very much less than that amount, and we would advise the acquisition of the two abridgments, particularly where the reports cannot be readily obtained. It is not a mere collection of marginal notes, but very many cases are stated and the judgments are given at length.

Chitty's Equity Index.—This is an index to all the reported cases, statutes, and general orders, in or

relating to the principles, pleading, and practice in equity and bankruptcy, in the several courts of equity in England and Ireland, the Privy Council, and the House of Lords, from the earliest period down to 1853. This is the 3rd edit. and is edited by Mr. Macaulay of the Equity Bar. There are four thick volumes in royal 8vo, and the price is £7 7s., a sum rather larger than one likes to invest in a mere digest. The work is a useful one for the practitioner, but not so for the student. The multiplicity of cases, often contradictory, is sufficient to breed confusion in the mind of the student, though it is useful as an armoury, for the barrister. Its value has certainly been increased by references in the last edition to the Jurist and Law Journal Reports.

Statutes.—With respect to the statutes, of course, where practicable, the practitioner will feel it necessary to furnish himself with the "Statutes at Large," but if he is satisfied with something less expensive and bulky, he may have his choice among several publications, such as Chitty's "Collection of Statutes," Crabb's "Digest and Index to the Statutes," Stamp's "Index to the Statutes," &c.

Chitty's Collection of Statutes.—The second edition of this work appeared under the superintendence of Messrs. Welsby and Beaven, in three very large volumes. The price is £6 14s. 6d. The work is a very useful one, and contains much information in its very excellent notes to the various enactments. It contains all the statutes of practical utility in the civil and criminal administration of justice down to a very recent period, and a supplemental volume is to appear every year in connexion with the original work. It appears that the titles "Criminal Law," "Poor" and "Sessions of Peace," can be detached and bound separately for sessions or other portable uses.

Crabb's Statutes.—This is a digest and index of all the statutes from Magna Charta to 6 & 7 Vic., with notices of the decisions thereon. There are added tables of contents and of cases; three vols. 8vo., £5 5s. Since the original issue a part has been published bringing the statutes and decisions thereon down to a somewhat later time. To which is added a copious index to the whole work. This sells for £1 1s. It is a laborious performance, and useful for mere reference.

Stamp's Statute Index.—A very good and compendious index to or digest of the Statute Law is that by Mr. Stamp, a solicitor, who has shown great ability in arranging this matter. The reader must not expect to find it supersede the statute book, but take it for what it is—a guide to or indicator of the existing statute law. There is a second edition, the price of which is 14s. The statutes are brought down to and include the session of 15 & 16 Victoria.

Evans' Statutes.—There is an older work than any of those before mentioned, which, as to the statutes prior to William the Fourth, will be found very useful, and can be bought cheap. It is called *Evans' Statutes*, and has some very useful notes.

Conveyancing Treatises.—We now come to treatises—as to which we shall consider separately such as relate to conveyancing, common law, equity, bankruptcy, and criminal law. As to conveyancing works, we suppose that every one will feel inclined, if he can conveniently afford it, to purchase Sweet's *Jarman's Bythewood*. It contains very good forms and some very useful information upon the chief subjects of conveyancing. Its chief drawback is that it is incomplete, and it is very uncertain when, if ever, the remaining volumes will appear. Also, the forms require re-modelling in consequence of the late real property acts. Some attempt to supply this has been made by Mr. Sweet in a separate work, intended, however, as a supplement to the principal work. It is also a very costly work, averaging 30s. per volume, and there will be about twelve volumes when complete. A less expensive work, though not so practically complete because not exhibiting such variety of forms, is Martin's *Conveyancing*, by Davidson. There are five volumes, and the price is £7. The work was published in 1844, so that it has not the benefit of the recent forms. But a new edition, under the superintendence of Messrs. Davidson and Wright, is in course of publication, of which vol. 2 only has yet appeared. It will be completed in 4 volumes. It incorporates Davidson's *Common Forms*, and rejects much, we might say all, of Mr. Martin's *Common Forms*. The price of vol. 1, which has but recently appeared, is £1 8s. There can be no doubt that this work is superior in point of execution to Jarman's *Bythewood*, and its forms are models for the conveyancer. It lacks, however, the great variety of Jarman's work, and has not so much text matter. If the solicitor wish for a less expensive work than either of these, there is a much lauded book called Crabb's *Precedents in Conveyancing and Commercial Forms*. There are two volumes; the last edition was issued in 1853, and it sells for £2 2s., but we cannot recommend it for use. The practical directions and text matter are worse than the precedents,

LIST OF CORRESPONDENTS.

We fear there have been several unintentional omissions from the list published at p. x; if so, we shall be glad to supply the omissions. The following were accidentally omitted—viz., Mr. F. Smith, Witham, Essex; Mr. W. Taylor, of Hexham.

PROFESSIONAL NEWS.

REMOVAL OF PAUPERS.—It appears that we are shortly to have some changes in the law of removal of paupers, as a select committee have reported that they are of opinion that the hearing and examination before justices required for the purpose of obtaining a warrant of removal under the 8 & 9 Vic. c. 117, should be always open and public; that the depositions of the pauper and witnesses should be taken *visd voce*, and committed to writing; that the warrant of removal should contain an express adjudication that the pauper was not at the time of making the order irremovable under the 9 & 10 Vic. c. 66, from residence, sickness, accident, or otherwise; that the name and age of every child under sixteen years of age, ordered to be removed, should be stated in the warrant of removal; that the warrant should state the place where the justices find the pauper to have been born or resided; that a notice of chargeability, accompanied by a copy of the warrant and statement of grounds of removal, should be sent, *mutatis mutandis*, to the guardians of the union in Ireland, or to the parochial board of the parish in Scotland within which the place is situate where the justices so find the pauper to have been born, or to have resided; that the boards in Ireland and Scotland should be allowed to appeal against such warrants of removal, without the consent of the English Poor-law Board being required; that in every case of actual removal the pauper should be delivered at the workhouse in Ireland, or to the local inspector of the poor in Scotland; and that the Poor-law Board should be empowered to regulate the time and manner of carrying out removals from England to Ireland or Scotland. The committee find reason to believe that the period of residence necessary to acquire the privilege of irremovability under sec. 1 of the act 9 & 10 Vic. c. 66, might properly be reduced from five to three years, and that the area of residence might properly be enlarged from the parish to the union. They recommend a declaratory enactment that the provisions of the said act do extend to poor persons born in Ireland and Scotland. Those resolutions apply to the removals from England. Those with regard to removals from Scotland include the same recommendations, with the additional ones, that no pauper should be removed of his own consent unless that consent be given before the sheriff; that removal should be regulated by the board of supervision; and that a settlement once acquired by residence, should not be lost by efflux of time under the 8 & 9 Vic. c. 83, till the expiration of the full period of five years therein mentioned. Several divisions took place in the committee.

REMUNERATION OF SOLICITORS.

(Ante, pp. 78, 79).

We now give the concluding portion of the Report of the Metropolitan and Provincial Law Association upon the subject of professional remuneration,—a subject we need hardly observe of as vital importance to the actual practitioner as to the expectant one—and we are happy to announce that the committee appear to entertain sanguine expectations that some, at least, of the injustice done to the profession will be shortly remedied.

"In ancient times, it was the policy of the law in all countries to regulate, by a fixed tariff, the remuneration which every class of labour was entitled to claim. This is now generally acknowledged to be a mistaken policy, and the tendency of modern legislation has, as a rule, been more and more to leave this question to be determined by private arrangement between the employer and the employed. This principle, however, which actually obtains with regard to the law in other countries where free-trade has not yet been introduced into commerce, has strangely enough in this country been actually restricted within the last twelve years, in its application to solicitors—for it was only in 1843, as mentioned above, that upon an understanding that has not been carried out, conveyancing business was for the first time subjected to taxation.

"Private contracts between the solicitor and his client are to some extent acted upon in all branches of business, except where the costs are ultimately to be paid out of the fund in court, which exception, however, includes the great bulk of all Chancery business. In other branches, therefore, to a certain extent, and in a half-acknowledged mode, the evils arising from the fixed scale of costs are remedied by the parties themselves, but in Chancery business the court will, of course, enter into no such arrangement, and it is here, therefore, that the injuries inflicted by the scale are most severely felt.

"Until within the last few years, all the officers of the court were paid by fees arbitrarily fixed upon certain minute steps in the proceedings, and the natural effect of this was found in the immense multiplication of intricate forms and useless technicalities. Of late years the principle of paying by salary, instead of by fees, has been widely introduced, and has been naturally accompanied by the simplification of proceedings and the abolition of technicalities, which has produced a great relief both to the Profession and to the public. All the arguments which were powerfully and successfully urged for the abolition of court fees speak with equal strength in favour of a new system of remuneration of solicitors, which may give them every possible motive

to shorten documents, to expedite proceedings, and to assume the responsibility of themselves performing their professional duties with as little extraneous aid as possible.

"The council of the Law Institution have put forward three claims, in which the committee entirely concur; viz.:

"1. To have redress against the vital injury to the profession, as far as their remuneration is concerned, effected by the general orders of the court, issued in October 1852, and the changes made in the practice, and which, if continued, must eventually prevent any respectable solicitor from practising in Chancery.

"2. To provide that general orders of the same description be not in future prepared and adopted without the previous knowledge of the solicitors, and affording them the opportunity of stating the objections that exist to the change.

"3. To have a full and impartial revision of the whole system of remuneration to solicitors, but especially for business in the Court of Chancery, and connected with the administration of property."

"It is, moreover, absolutely necessary to extend the revision of law costs to other branches of business, and especially to conveyancing, in which such a change as that pointed out by the select committee of the House of Lords in the year 1853, by adopting the system of registration of legal titles only, would be absolutely ruinous, unless accompanied by some corresponding alteration from the *old* mode of remuneration solely by length.

"The committee have thought it their duty to make this plain statement on a subject so seriously affecting the interests of the profession; but they desire to add, that the inclination now shown in high quarters to hear those whose vital interests are involved in their decisions, and the just and enlightened views likely to be taken by those with whom the decisions rest, afford grounds for hoping that the profession will ultimately receive that justice to which they are entitled. The members of the association are requested to consider this matter with the great seriousness it demands; and to urge on the press, and on all public men they have access to, not merely the injustice to themselves, but the mischief effected to the public, by continuing the present system of taxation. A wide public discussion of the subject must precede any such amendment, and it is for us to set that going. It is only by every one contributing something towards that result that we can expect it to be attained.

"P.S.—The committee is happy to be able to inform the members of the association that since the above remarks have been in the press, their

chairman has had the advantage of a long interview with the authorities, by whom the question of costs is now being considered, who intimated that they were satisfied that a most serious loss had been sustained by the profession by the recent changes in Chancery practice; and that steps ought to be immediately taken to remedy the evil.

"The question only remains, how far the *quantum meruit* principle will be applied.

FUSION OF LAW AND EQUITY.

Of late the advocates of the Fusion of Equity and Law have been remarkably silent, but we believe they intend very shortly to renew the agitation, and we therefore think it may be serviceable to call attention to some remarks on this subject to be found in a lecture delivered at the Law Institution by Mr. A. Shee, in which he has pointed out that the question should not be so much as to the fusion of the equitable and legal jurisdictions as the improvement of equitable *procedure*—a point of the utmost importance, so far as it can be accomplished without injury to the practitioners. The greatest defect in the practice of equity is undoubtedly the system of fees to the various officers, which necessarily require a great outlay on the part of the solicitor. If these fees were abolished or put on a more reasonable footing the practice might be much simplified without injury to the solicitors. As will be seen in another part of this number the subject of the remuneration to solicitors has undergone some discussion and some hopes of an improvement are held out.

Equity and positive law contrasted—*The spirit and the letter of the law.*—Leaving aside all questions of a historical and antiquarian character, connected with the origin of that administrative and judicial power, technically described by the text-writers, as the extraordinary jurisdiction of the *Great Seal*, let us observe the main points in which it differs from the action of strict or positive law. And first it may be said, that whereas the latter is chiefly conversant with the distinct or definite acts, and mutual transactions of men, considered in reference to the prescribed formalities by which their purport is evidenced, and in which, as it were, their legal essence consists; equity deals rather with the substance of the moral obligations that are supposed to be involved in these acts or transactions, but which cannot, in every case, be measured or appreciated by the application of the merely abstract rule framed for the purpose of creating or defining the right which is the subject of positive legislation. It is, in its most comprehensive signification, the *spirit*,

in contradistinction to the *bare* letter of the law; so far as that law is dealing with questions which are amenable to the tribunal of conscience, and within the dominion of that principle which, in a broad and straightforward sense, we recognise as *fair play*.

What law and equity respectively do.—Thus, while the *law*, as represented by prescriptive rules or maxims, of too remote a date to admit of our ascertaining their precise origin, or appealing to their first authoritative sanction,—which is what we generally understand by the common law,—or as defined and embodied in acts of more recent and distinct legislation, as in the case of the whole body of the statute law,—contents itself with declaring rights and providing remedies applicable to any given state of things which may fall strictly within a generic class, ascertained and defined by reference to legal acts and formalities,—*Equity* takes notice of the various collateral or accompanying circumstances, affecting the moral position of the parties in relation to each other, which may often render the enforcement of a legal right an act of great social hardship, nay, even of absolute and flagrant injustice. Where this is the case, it interposes its authority to arrest, suspend, or totally nullify, as the case may be, the ordinary course of law, defeating the designs and machinations of those who would artfully wrest the power conferred by that law to purposes of fraud and iniquity, rescuing unguarded ignorance and simplicity from the legal and technical snares which crafty knowledge and experience often lay for their destruction, and restoring with nice discrimination and unerring skill the true balance of conscientious justice.

Power of modifying technical rigour.—It is quite obvious that no system of legal administration could be adapted to the wants of human society in even a moderately advanced state of civilization where there did not exist in some quarter a power of modifying the technical rigour, and correcting or qualifying the practical and moral mistakes, so to speak, of enactive and restrictive law. Where this is not the case, the maxim "*summum jus summa injuria*," must be one of daily, almost of hourly illustration; for law, as contradistinguished from equity, is in its positive character, and whether in its declaratory or prohibitive aspect, a stern, unswerving, and uncompromising power, doubtless founded upon, and called into action by, principles of general morality and abstract justice, but once set in motion, pursuing its course with a blind disregard to individual consequences. When the law declares that such and such an act, or such and such a formal transaction between A. and B., shall have such and such a result as regards the mutual interest and, relative position of those parties, if this

result be inevitable in every case where the prescribed formalities are found to answer the abstract definition of the act, and thereby ascertain the rights or duties of those who have participated in or are to be legally affected by it—it must necessarily follow that falsehood and trickery in every shape in which they can be brought to bear on the transactions of men, will be successfully resorted to by the least scrupulous against the honest, simple, and unsuspecting portion of the community. Improvident bargains, delusive agreements, unconscientious stipulations will be perpetually imposed on the thoughtless and the unwary by means of shameless misrepresentation or audacious fiction. The unsuspecting victim entrapped under false pretences, or in ignorance of his own rights, into the execution of a document, or the performance of a legal act, injuriously affecting those rights, would have no redress, and be compelled to submit in silence to the loss or detriment which his own want of caution and the knavery of others had combined to inflict upon him.

Difficulty of a code of positive law.—Some remedy or preventive must therefore be provided in every mature system of jurisprudence against evils of this nature; and the task of classifying and defining with requisite exactness the various species of fraud which may be resorted to; with a view of wresting the machinery of the law to the purposes of injustice, must always be among the chief difficulties attendant on the compilation of a code adapted to the legal exigencies of a civilised state, and framed upon the principle of justice being administered, with a due regard to technical rules and moral proprieties, by one and the same tribunal or class of tribunals. The theory of the law in almost every European country but our own, admits and affects to carry out this principle; and the ordinary courts, therefore, have to weigh the circumstances of every case, and frame their decision in reference to the conscientious as well as the merely technical or formal aspect of the system.

Amalgamation or consolidation of law and equity.—This administrative simplicity in matters of law is considered by many publicists and philosophical inquirers or theorists as far preferable to the more complicated, and, as it appears at first sight, more cumbrous, machinery which in England and Ireland is employed in working out the ends of justice; where, from time immemorial, the dispensing of positive and strictly technical law has been confided to a set of tribunals quite distinct from those which are engaged in sifting and enforcing the conscientious claims of parties in litigation on points where the decision of the merely legal question would but imperfectly carry out, or perhaps wholly subvert,

the principles of moral right and duty. It cannot be denied that there is a strong and a rapidly increasing party springing up among us, who are crying out for the amalgamation or consolidation of law and equity as a necessity of our more advanced and matured civilisation,—as an inevitable concession to the spirit of a more enlightened and philosophical age. These forensic *dilettanti* are profoundly impressed with the belief that in such a fusion of our national judicial functions lies the real remedy of all those evils, which, with more or less of reason or plausibility, are by common consent laid to the charge of the respective jurisdictions of law and equity. Ingenuous and sanguine enthusiasts, they fondly believe that the delay and expense of procedure, for which the Court of Chancery is universally, and sometimes perhaps not altogether unjustly, blamed, and which cause the very name of that august tribunal to be held in such salutary awe, are incident to and solely inherent in the peculiar structure and machinery of the court itself, and that once transferred from the hands of judges who have made its principles their exclusive study and occupation to the control of the ordinary legal tribunals, this important jurisdiction will be administered with a degree of cheapness and celerity that will recall the edifying judicial simplicity of the patriarchal ages.

To those, however, who can boast a more intimate acquaintance with the working of our whole legal system, and who have had opportunities of comparing its practical results with the corresponding products of forensic and judicial wisdom in foreign countries, and, indeed, in one nearer home, viz., *Scotland*, where this separation of the two jurisdictions does not prevail, the expediency of the proposed change will not appear so manifest as our theoretic philosophers would have us believe.

Equitable procedure open to objection.—But distinct equitable jurisdiction beneficial.—That our system of equitable jurisdiction has been, and perhaps still is, open to censure in matters connected with the details of procedure, as too much encumbered with forms and technicalities of practice, often occasioning unnecessary delay and consequent expense, we may fairly admit. But as the existence of these evils and their appropriate remedy are questions wholly extrinsic to that which is involved in the exclusive nature of the jurisdiction itself, so its incorporation with the strictly legal system of procedure can derive no authoritative or argumentative recommendation from their supposed prevalence or imputed enormity. On the other hand, it is impossible to deny that the peculiar position which the tribunals representing the authority of the Great Seal in matters of judicial cognizance have from time immemorial assumed in

reference to the course of merely technical law, has had a most beneficial effect on the true interests of justice, by clearly defining, distinguishing, and developing that more exalted portion of its functions, in which its very essence and spirit mainly consist. Having originally claimed and fearlessly exercised the right of disregarding the shackles and trammels of positive law, wherever the genuine and immutable principles of truth and fair dealing were at stake, the Court of Chancery has ever bestowed on the examination and assertion of these principles that earnest and undivided attention—that exclusive and concentrated devotion, without which, moral science and philosophic truth can never be successfully investigated, and which, in their votaries, they never fail to reward. The Lecturer here observed, that he was not invoking that religious veneration for the wisdom of our ancestors, so often appealed to in defence of time-honoured absurdities and obsolete errors in political or social affairs, he was dealing with practical results in no manner ascribable to the far-sighted theories of legislative philosophy, but springing from the combined operation of many distinct causes, in which political accident, ecclesiastical policy, and national predilections, have perhaps each had a share. The question is not whether it be theoretically right, or preferable in the abstract, that Law and Equity should be administered as two separate jurisdictions, but whether, such a separation having existed from a period of our history so remote, that in our most ancient judicial records we shall in vain seek for any traces of a different order of things, we are called upon, for the sake of mere theory, and without any certain prospect of benefit or improvement, to adopt a new system, and encounter all the practical inconveniences involved in the completion of so great a change. Before this great administrative revolution can be reasonably forced upon us by the *doctrinaires* of our day, the *onus probandi* lies upon them, to show that the existing system has been detrimental to the interests of justice, or at least that the system which they seek to substitute has worked better for those interests amongst our neighbours in France, in Scotland, or elsewhere. Now, upon this point, he asserted without fear of contradiction or at least without fear of refutation, that no such case could be made out against the Court of Chancery. We might confidently challenge the judicial system, of the whole civilised world to produce an administration of justice on *equitable* principles which can be considered as more effective or effectual than our own. It was the lecturer's firm conviction, that the distinct character of the jurisdiction has had a most beneficial effect in elucidating the study of Equity as an important branch of ethical science, and freeing the judicial mind engaged in its adminis-

tration, from a host of conventional and technical impediments to the course of substantial justice, that must inevitably beset and bewilder the action of that tribunal which, bound *primâ facie*, by the terms of positive law, and chiefly engaged in the enforcement of what it prescribes, has ever and anon to check or qualify its results, by reference to principles of less easy ascertainment and more doubtful application. For be it remembered, that consolidate them or amalgamate them as you will, or as you can, in practice, Law, that is *merely positive law* and Equity are in their very essence philosophically distinguishable; and, however, in a well-organised system of judicial policy, the latter may be taken or studied as the ground-work or guide of the former, we can never blend the two abstractions into one idea, or reduce their respective intrinsic principles to one and the same simple theory.

Rigour of written law requires to be modified.—Equity, by whomsoever administered, must ever be in a vast majority of cases exceptional to, and either cumulative or restrictive of, some *positive* general law. In all early and fundamental legislation, laws are necessarily framed with reference to simple combinations of fact or circumstance—fashioned to meet and include broad and extensive classes of action and subject. Their terms imply a sweeping and unvarying range of operation as applicable to rights, duties or wrongs of obvious apprehension and easy definition. But, however just or reasonable these laws may be in themselves, when applied to the precise state of circumstances which they contemplate, taken in the ordinary aspect or signification of those circumstances—once bring them into active operation, and innumerable cases will from time to time arise where the enforcement of the letter of the Law would inflict a grievous moral wrong, and thereby totally defeat the general object for which laws are framed. In such cases, the administrative judicial authority, if animated by the true spirit of justice, will struggle hard against the unbending rigour of the written Law, and seek to qualify its inconvenient and peremptory precision by a certain latitude of interpretation or laxity of application. If the tribunal itself have power and wisdom combined sufficient, as occasion may require, to divert the course of positive law into a purely equitable channel, the authority of the Judge supplies the deficiencies of the legislator, and the exceptional decree, recorded as a precedent, may establish an *exceptional rule*, which in process of time acquires in all instances, where the controlling moral circumstances of the case are identical or similar, a degree of stringency as absolute as could be supplied by legislative enactment.

Development of equitable doctrines.—Still, the progress of this judicial development, in all systems

where the general rule as originally laid down is distinct clear, and imperative, must be tardy, timid, and uncertain. The assumption of a *dispensing power*,—and in its inception, it is no less,—against the sovereign authority, embodied in the shape of positive law, must ever be felt as a bold measure on the part of those who have been selected by that sovereign authority itself to administer the Law as they find it written; and the natural reluctance to deviate from the course prescribed by that authority, cannot but act as a very powerful check on those equitable tendencies that would in many cases suggest a conscientious modification of merely legal principle.

The course here glanced at must have been, to some extent at least, that which the judicial system has followed in its development in those countries where the principles of Law and Equity are within the competency of the same judicial functions, and where indeed the judicial theory itself recognises no boundary and affects to admit no distinction between them.

The civilians and canonists.—The labours of the civilians and canonists, including the most successful efforts of those who in former ages or in more recent times have cultivated and developed the science of jurisprudence with a distinct view to legislation, must be ultimately referred to this origin; as the attempt to define and classify the various cases in which a general positive rule is to be disregarded or modified, necessarily presupposes the earlier existence of the rule itself in its unqualified rigour. The necessity or expediency of codification on a scale sufficiently extensive to include the whole range of what may be termed exceptional justice, must have been suggested by some experience of the imperfect success with which merely judicial or administrative attempts to maintain the balance of conscientious right against express enactment are usually attended. In most of those continental countries, the progress of whose civilization has in some degree kept pace with our own, or who at least date from about the same period as ourselves their emergence from that state of barbarism which the irruption of the northern hordes had spread over the face of Europe, the administrative judicial power appears to have early had the courage and address to adopt a greater or lesser portion of the system of the civilians in modifications of the simple and fundamental laws of their earlier and ruder polity; and thus, in the course of time, the equitable principle which the civil law may be said to represent, became partially incorporated in their general scheme of legal procedure. In the case of France, indeed, and the other countries and where the *Codé Napoléon* has been on points of abstract and universal justice adopted into the national system, the equitable

principles of the civilians have to a certain degree assumed the shape and consistence of positive law.

Inflexibility of English positive law.—In England, the ordinary tribunals of the country, though enjoying the same opportunities of controlling, by judicial interpretation or extension, the blind and unbending rigour of our fundamental and positive laws, persisted in adhering throughout to their letter, and refused to admit the consideration of those more discriminating principles of administrative justice developed in the general Civil and Ecclesiastical Law of Europe, in the framing or modifying of their decrees.

Modification of legal strictness by royal prerogative.—But that occasional modification of legal strictness—indispensable for attaining the true ends of justice—though pertinaciously withheld and refused by the judicial expositors of the law, was here long amply supplied in a distinct and separate shape, by the direct agency and controlling power of the Royal Prerogative.

The Crown the fountain of justice.—In the theory of our constitution, the Crown is the fountain of justice as well as of honour; and to those who, from time to time, were entrusted with the custody of the Great Seal—as the official and effective symbol of the kingly power—was also confided the care of redressing or averting, on principles of conscientious justice, the wrongs inflicted or threatened in the name of strict law.

Earliest Lords Chancellor were ecclesiastics.—The individuals to whom this important authority was thus delegated, were in early days invariably ecclesiastics, selected, no doubt, from among the most learned and enlightened of their order, for the high office of Chancellor or Keeper of the Great Seal. They were men to whom, from the nature and course of their canonical studies, the first principles of moral and philosophical jurisprudence were generally familiar. "The king's name," says the Psalmist, 'is a tower of strength,' and so indeed it proved to these ecclesiastical Chancellors in the administration of judicial functions, which, if estimated by the constitutional standard of the present day, might almost be said to be usurped over the ordinary tribunals of the land. Strong in the confidence of the Crown, and the uncontrolled and unquestioned exercise of a prerogative as august as it was formidable, they were not restrained by the cobwebs of form or the trammels of legal technicality from deciding *secundum æquum et justum* on the matters brought under their cognizance. Dispensers of justice, indeed, in its highest attributes, but redressers or controllers of law, they had none of those grounds for caution or timidity in their judgments, which rendered the deviation from mere

legal principles so difficult to the administrators of ordinary law. Following and adhering to the law, only so far as its rules and maxims did not conflict with substantial justice in the individual case before them, they unhesitatingly set aside '*the letter which killeth*,' in favour of the '*spirit*' which '*giveth life*,' and called upon to administer a jurisdiction paramount to the cause and effect of positive law, they applied themselves to work out the principles of that higher jurisdiction with a freedom which the consciousness of superior enlightenment, and the virtual possession of irresponsible power, could alone impart and sustain.

English equity distinct from positive law.—With us, therefore, from the first, equity, in its more extended sense, and in reference to its more general attributes, has been practically, as well as theoretically, a distinct and separate science; and in this case, as in most cases where concentration of mind has been brought to bear on a particular branch of knowledge or philosophy, to the exclusion of other and analogous subjects, except so far as they have an immediate and operative reference to the main object of study, the theory has in process of time been better understood and more clearly defined in its nature and application, than it would probably have been under a system in which the science itself had commanded from those who were intrusted with its practical results, a more divided or less exclusive attention. To borrow the language of chemistry, we may say, that through the effective analytical process to which the experimental matter has been subjected in the laboratory of the Great Seal, the sediment of mere law has been *precipitated*, and the pure spirit of conscientious justice has been evolved in its brightest and clearest form and aspect. This is what the most inveterate assailants of the Court of Chancery will hardly venture to deny; at least such among them as have any real acquaintance with the structure, principles, and practical results of the jurisdiction.

The objections are to the equitable procedure and not to the jurisdiction.—In saying this, the lecturer was referring to the principle involved in the decision of the court upon any given point submitted to its judgment, where the interests of moral right, truth, and justice are at stake. It was not of the mere technical forms preliminary or incidental to the act of bringing the matter before the judge for his decision, but of the judicial and moral grounds of that decision, that he spoke. The expense and delay of litigation, the length of verbose pleadings, and the cumbrous nature of the procedure, are evils which, *as far as they exist*,—and we must not forget that they have been much diminished by legislative and administrative regulations within the last few

years,—are wholly extrinsic to the principle and moral action of the jurisdiction itself. The costs of a Chancery suit may be unnecessarily or oppressively heavy, while the decree defining the rights of the parties in litigation may be the embodiment of the highest moral and judicial wisdom; and our indignation at the amount of the one, ought not to prevent us from doing full justice to the merits of the other. If the ascent to the temple be tortuous, and the path rugged and uneven,—if the approach should even be encumbered with stumbling-blocks and obstacles of the most vexatious or repulsive character, it may indeed afford an excellent reason for shortening the road, smoothing down the asperities, and removing every unnecessary obstruction from the pathway; but it cannot supply an argument against our faith in the oracle, or injuriously affect the wisdom and prophetic truth of its responses. While, therefore, the motives of our reliance—*the grounds of our faith*—remain unshaken, why should we listen eagerly or willingly to the proposal of transferring our devotional homage elsewhere? In our system, as at present constituted, we have every guarantee for substantial justice on the part of the existing tribunals which a long experience of their theoretic knowledge and judicial wisdom can secure; and, if we are prudent, while we do our best to remove or lessen the grievances of procedure which may be fairly charged on our system of equity, we shall exhibit an anxious care to preserve and sustain the system itself in its distinct and effective integrity.

Technical equity.—In these observations, suggested by the ventilation of certain schemes or projects now afloat for the consolidation of law and equity, the lecturer observed that he was dealing with the jurisdiction employed in dispensing justice on the footing of the latter science, in its broadest, and most theoretic character. But equity, taken in its general sense as the jurisdiction administered under the authority of the Great Seal, had functions of a more technical kind, which, although traceable to the main principle on which the whole of that jurisdiction is founded, were in their administration subject to rules as arbitrary and as nearly uniform in their operation as the action of the common law itself.

CODIFICATION.—To a code such as those that have appeared in modern times Savigny is decidedly opposed. Any attempt to frame a perfect work of a similar description, from the materials at hand, and in the existing state of legal acquirement on the continent, he thinks would be abortive; and he deprecates an enterprize where miscarriage would be disastrous, and success itself rather productive of future than present benefit.

APPEALS TO THE LORDS.

We have (*ante*, p. 59) noticed some observations of the Lord Chancellor and Lord Campbell in reply to the attacks of the Solicitor-General on the method of hearing and disposing of appeals in the House of Lords. As this is a subject which is attracting some attention, and so little seems to be understood as to the origin of that jurisdiction we trust that the following account of the origin of the jurisdiction of the lords in appeals (chiefly abridged from the learned preface of the late Mr. Hargrave to Sir Matthew Hale's work on the jurisdiction of the Lords' House) will not be unacceptable to our readers, many of whom will be surprised to learn therefrom that the assumption by the House of Lords of the appellate jurisdiction over courts of equity did not take place until so comparatively recent a period as the reign of Charles the Second.

The appellate jurisdiction at present exercised by the Lords is perhaps the most absurd and objectionable part of our judicial system; and it is not altogether unworthy of observation, that the most eminent lawyers this country ever saw have considered the exercise of such jurisdiction an infringement of the constitution, and an assumption of an authority which belonged to the whole Parliament, of which the Lords formed only a part.

The Rolls of Parliament, from the time of Edward the First down to the end of the reign of Henry the Fourth, are, as it is well known, full of judicial proceedings; but, after that period, we find no trace of the Parliament having exercised jurisdiction in civil suits until some time after the accession of James the First. During the early part of that reign, the Lords exercised, without scruple, an appellate jurisdiction over common law suits, but under the delegation of writs of error issued by the Crown, authorising them to adjudicate the particular case; and it is remarkable that they then thought they had no power to exercise an appellate jurisdiction over decrees in equity, upon a petition presented to themselves; and a committee appointed to investigate the subject reported that there was no precedent of the exercise of jurisdiction by the Lords over equity decrees, except under the authority of some writ, commission, indorsement of petition, or other act emanating from the Crown. Towards the end of the reign of James the First, the Lords appear, however, frequently to have adjudicated between party and party, on original petitions of complaint presented to themselves, where the matter in dispute had never been discussed before any inferior tribunal, and yet they forbore from assuming upon such petitions the right to examine equity decrees; and the usual mode of impugning the

Chancellor's judgments seems to have been to procure a commission from the Crown, directed to certain Lords or judges to review them, or to reverse them by a bill brought into Parliament for that purpose. In one case, towards the close of this reign, a remonstrance was made against the exercise by the Lords of appellate jurisdiction over an Equity Order upon a petition to themselves, and they acquiesced in the validity of the objection, and obtained a commission from the Crown to enable them to review the particular case.

In Charles the First's second Parliament, the House of Lords acted in all respects as a Court having authority to try original causes between subject and subject. Sometimes they heard the causes themselves, and sometimes they selected persons whom they empowered to hear them in their stead. In this Parliament, they seem first to have approached to the exercise of appellate jurisdiction over Courts of Equity, and actually ordered a cause to be argued by counsel at the bar of the House, but the Parliament was dissolved before the cause was heard. In Charles the First's fourth Parliament, the Lords made great advances towards establishing in themselves an original and appellate jurisdiction in civil suits, both ecclesiastical and temporal; but still it does not appear that there is amongst the proceedings of this Parliament a direct precedent of any order made by the Lords themselves upon a petition of appeal from a Court of Equity, with such a hearing of the cause as can be considered to amount to a complete unequivocal exercise of equitable appellate jurisdiction; and it is remarkable, that when this Parliament was dissolved, three bills for reversing three different decisions of the Court of Chancery were depending before the House of Commons.

The first direct petition from an equity decree, and the first order of the Lords, reversing an equity decree upon such petition, without any authority delegated to them by the Crown, are stated by Lord Hale to be in the year 1640, during the sitting of the Long Parliament, in the time of the Commonwealth. Lord Hale, if I recollect right, observes, that the trouble of the times caused parties to throng to the House of Lords upon all occasions; and the Lords were induced, from the difficulty the suitors at that time experienced in obtaining relief in the ordinary tribunals, to extend the exercise of their jurisdiction, both original and appellate, beyond all former limits; and he argues, that orders made by the House, during a period of general anarchy, when every member of the legislative body was disjointed, ought not to be drawn into precedents for future times; and, indeed, if the acts of the Long Parliament are to be cited as examples, they would

first prove that the Lords had inherent in them the privilege of exercising the judicial functions in almost every case, and in the next place that the order of the peerage did not exist as a component part of the legislature.

Notwithstanding, however, the commotion of the times, the usurpation of original and appellate jurisdiction by the Lords did not pass wholly without notice. The cases of Maynard and Lilburne occurred 1646 and 1647, and gave rise to a discussion as to the extent of the judicial authority of the Lords, and every lawyer in Westminster Hall (except Prynne, who, after having been mainly instrumental in effecting the abolition of the Star Chamber, now with singular inconsistency exalted the judicature of the Lords to an independence on Parliament) seemed to think that the Lords had assumed a most unwarrantable jurisdiction, and wholly inconsistent with the constitution. It is worth while also to observe, that Fairfax, and the council of the parliamentary army, in August, 1647, agreed upon certain heads of a proposal to be addressed to the Commissioners of the Parliament residing with the army, some of which touched this question of the Peers' claim of jurisdiction, and demanded a declaration that the original and appellate jurisdiction in Parliament were in the Lords and Commons jointly, and that the Lords could not exercise either jurisdiction without the concurrence of the Commons.

Little seems to be known as to the judicature in Parliament from the abolition of the regal office and the House of Peers until the Restoration. Cromwell appears to have seen the absurdity of a court whose members were ignorant of the law they were to administer; and it is conjectured that the ordinary mode of examining judgments and decrees of the courts of law and equity, was by issuing writs of errors and commissions, delegating to particular persons authority for that purpose. The ordinance, however, for regulating and limiting the jurisdiction of the Court of Chancery already mentioned, gave a very satisfactory appeal from the decisions of that tribunal by granting the privilege of a rehearing before the Lord Chancellor or Lord Keeper, joined by six judges, of whom two were directed to be taken out of each of the three great common law courts, and of whom also one was to be a chief justice or chief baron.

During the Convention Parliament, the Lords acted as if there were an illimited jurisdiction, original and appellate, inherent in the peerage, and they would not allow that the concurrence of the Lower House was requisite to give effect to their judicial acts.

The House of Commons protested against this

usurpation of exclusive jurisdiction; but as any discussion of the subject was likely to cause a rupture between the two Houses, which at that period would have been productive of consequences most calamitous to the nation, the commissioners, by the advice of Sir Matthew Hale and Sir Heneage Finch (afterwards Lord Nottingham), declined engaging any further in the dispute of judicature, but reserved the point to be discussed at a more proper season.

It was during the following Parliament that the principal contests between the two Houses respecting the right of judicature arose. In the great case of Skinner and the East India Company, the Lords claimed the right to adjudicate between party and party in the first instance, and not by way of appeal. The votes of the House of Commons, however, soon proclaimed to the people of England that the exercise by the Lords of original jurisdiction in civil causes was an usurpation. The case of Skinner and the East India Company ended in a compromise between the two Houses, but such a termination of the contest was a blow fatal to the claim of the Lords, and they have ever since relinquished the exercise of original jurisdiction in civil causes.

In the fourth session of the Long Parliament of Charles the Second, a new quarrel of the two Houses arose on another branch of judicature, and the event was different. The great question in this dispute was respecting the appellate jurisdiction exercised by the Lords over decrees in equity, upon a mere petition presented to themselves; and the House of Commons came to a determination that the Lords had no such privilege as they claimed, and passed a Resolution that any person soliciting, pleading, or prosecuting any appeal against any commoner of England before the House of Lords, should be deemed and taken a betrayer of the rights and liberties of the people of England, and should be proceeded against accordingly. After such a resolution, it may seem extraordinary that the Lords have been left in quiet possession of this privilege; but the King siding with the Commons, the latter began to open their eyes to the consequences of their depriving the Lords of appellate jurisdiction over equity, which would be a return of such jurisdiction to commissioners named by the King, whose decision would be final, unless the entire Parliament interfered as a court of last resort. The Commons, therefore, seemed to have thought that they had done enough for the public weal by securing a victory over the claim of the Lords to original jurisdiction in civil suits; and that, however unfounded their claim to appellate jurisdiction over equity decrees might be in principle, it was rather an affair between the King and the Lords than between the Lords and the Commons,—and that to gain a

victory over the Lords on this point would be only to win a prize for the Crown, under circumstances which made it more safe for the constitution that the power should continue with the peerage.

The Commons seem to have been persuaded, that, in the instance of appellate jurisdiction over equity causes, however clearly the strict doctrine of the constitution might be with them, their assertion of it was to struggle against their own interest, and to prefer confidence in nominees of the Crown to confidence in the Upper House; and consequently that success in their pursuit would be to enlarge the sphere of Royal influence at a time when, from the ambitious schemes of the misguided monarch, the contraction of the kingly power was deemed the true policy.

But, whatever were the reasons which induced the change of disposition in the Commons, the effect of the change was leaving the Lords in quiet possession of the object, which had been so warmly contested for with them in the former session; and though the Long Parliament of Charles was permitted to subsist for two other sessions, yet the acquiescence of the same House of Commons continued in that unequivocal way, which imported, that the appellate jurisdiction of the Lords was not intended to be questioned: and "Thus," continues the same author, "the issue of the fight for the appellate jurisdiction became in effect as much a decided victory to the Lords, as the issue of the previous fight for original jurisdiction was in effect a victory to the Commons. But there was this difference between the two victories. The point gained by the Commons was carried against the united efforts both of King and Lords; but the point gained by the Lords seems at last to have been a voluntary concession of the Commons, from a discovery, that, if they prevailed, the Crown would be fixed in the exercise of a discretion equally formidable to both Houses. Nor was this the only difference. The victory of the Commons appears to have been gained upon principles of the constitution approved by Lord Hale, by Lord Nottingham, by Lord Vaughan, by almost the whole of Westminster Hall, except that Champion of Aristocratical power, in its most excessive latitude, the memorable Mr. Prynne. But the victory of the Lords appears to have been effected by the fear of the Commons, that unless they, by their acquiescence, sanctioned what in principle some of the first lawyers of the country, as well as themselves, held an authorised assumption by the Lords, it would leave the Crown and its Ministers with more power over appellate judicature than, from the want of confidence in the Crown and some of its advisers, was thought to be compatible with the

public interest. So to be defeated was to the Commons in the nature of a second victory, not indeed over the Lords, but over themselves and their own pride, in respect of the arduousness on the part of such an assembly to sound a retreat, after being seemingly pledged to fight the battle out; and also over the secret views of the Crown, if really there was any deep scheme of making the Commons a mere instrument for increasing regal influence under the mask of preventing an unconstitutional mode of administering appellate justice.

There are no subsequent occurrences with respect to the question of the jurisdiction of the House of Peers, which it is necessary to notice in this short narration. The parliamentary judicature rests nearly on the same basis as it did in the reign of Charles the Second. The Lords had claimed an original jurisdiction in civil suits and an appellate jurisdiction over all courts and all causes; and had insisted that their judicative power was primitive and inherent in the peerage by the constitution; and that they had authority, as the court of last resort, to exercise parliamentary judicature singly and solely; and without the concurrence or authority of the King or Commons. The claim of original jurisdiction has been abandoned, and the right to judge appeals from the ecclesiastical and maritime courts and in prize causes, and from the colonies, has been in like manner relinquished by the Lords, although they have, with singular inconsistency, retained the jurisdiction over appeals from Courts of Equity.

LAW REFORM.—THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS.

SIR,—Reverting to an able article in last Saturday's *Times* upon the abuses of the law, allow me briefly to draw the attention of the public, through the medium of your columns, to the subject matter of a conversation in the House of Lords, relative to a passage contained in a speech delivered by the Solicitor-General, in the House of Commons on the preceding Friday, as to the constitution of the House as a court of ultimate appeal in judicial cases. And as much is constantly being said and written as to the procedure of the inferior tribunals, I trust you will think that it is time the public was made acquainted with the constitution of our highest court of appeal in judicial matters; a subject that has occupied the attention of a vast number of the members of the profession, whose consideration of it is likely to be revived by the remarks of the Lord Chancellor, Lord St. Leonards, and Lord Campbell, as reported in the *Times* of the 14th ultimo. The portion of the speech referred to, and strongly

animadverted upon, by the noble and learned lords, was thus reported:—

"There was one point of great importance to which he (the Solicitor-General) might advert. Several instances had occurred in which the House of Lords, sitting as a court of appeal, had failed to discharge satisfactorily its proper functions. He quite admitted that scarcely anything was amended in the judicial institutions of this country, until the recognition of the necessity of that amendment had been passed on, so to speak, from father to son, and from generation to generation; and so it was with regard to the House of Lords. It was, therefore, doubtful how long it might be before they got a tribunal in the last resort satisfactory in its constitution. The members of the present tribunal felt themselves at liberty to attend or not attend as they pleased, with the exception of the Lord Chancellor, all the rest of the court were mere volunteers; they attended a judicial sitting as they would a debate; they felt themselves at liberty to remain during the whole of the arguments or not; and the result was that this court, the decisions of which ought to be unalterable as the laws of the Medes and Persians, was felt to be unsatisfactory in its constitution, and inferior to the lowest tribunal in what ought to be the accompaniments of a court of justice."

These are the observations which have generated the indignation of Lords St. Leonards and Campbell, who arrived at the conclusion that it was an attack upon the noble and learned lord who occupied the woolsack, and who presided over their lordship's house sitting as a court of appeal, though the Lord Chancellor does not seem to have acquiesced in this conclusion, but to have taken the words not so much as an attack upon himself as upon the judicial system of the House. He evidently partakes of their indignation, though he exhibits it in a somewhat milder form. However, whether the learned Solicitor-General's remarks are to be construed into an attack against the court, or the noble and learned persons forming it, I do not intend to inquire; but will venture to offer a few observations upon the former branch of the subject, leaving your readers to draw their own conclusions.

Though the appellate jurisdiction of the House of Lords is now most firmly established, and considered of vital importance; few points were, after the Restoration, more seriously debated than what appertained to "*original*" and what to "*appellate*" jurisdiction; and it should be known to all who are favourable to hereditary power that these appeals, between party and party, were only first introduced and entered into the journals of the House in 1581. Any person who is desirous of pursuing the subject to its source, may be directed to consult Lord Har-

court's *M.S. Tables*; Mr. Hargrave's preface to Sir Matt. Hale's "*Jurisdiction of the House of Lords*;" the second volume of Paley's "*Philosophy*;" and "*Lettres sur la Cour de la Chancellerie et Quelques Points de la Jurisprudence Anglaise*."

But enough of its original assumption of the appellate jurisdiction. Is it constituted to satisfy the ends of justice? An answer to which question, I think, will easily be found by a brief comparison of its administrative functions with those of any of the superior courts of common law or equity; presided over mostly by those selected from the most eminent working men of the profession; frequently men infinitely superior in legal acumen and legal knowledge, to those filling the more exalted position of Chancellor, or those who have passed thence into the acting hereditary judges of the highest court in the land; from whose judgment no further appeal is permitted, and to whose determination every subordinate tribunal must conform. Indeed, the Lord Chancellor it is well known is not usually selected for those great essential qualifications which go to form the judge; he is generally more of a political than a judicial character; often a keen political partisan, chosen for his great debating powers and party services, and in every respect more fitted to shine in the senate than at the bar or on the bench. These are the sort of men of whom this Supreme Court of Appeal is formed, though there are now living illustrious exceptions to the rule; but we have nothing to do with individuals, only with the institution of which they form integral portions; and though it is not intended to be used as an argument, it must not be lost sight of as a fact, that others than these law lords have the right to vote on appeal causes; every peer, be he law or lay, has an equal right. Thus, in the well-known case of the *Queen v. O'Connell*, which was a writ of error to the House of Lords against the judgment of the Irish bench; it was unsuccessfully attempted to divide the House, although a majority of the law lords had given it as their opinion that the judgment of the court below should be reversed, *one lay peer saying that he had attentively considered the subject and was desirous of giving his opinion*. And should a like case arise, there is every reason to suppose that another such discussion would ensue before the *hereditary judges* could be persuaded to forego the exercise of their valuable birthright.

But should this jurisdiction, affecting both the property and liberty of the subject of our beloved Queen, remain in this unsatisfactory state? For though it is not very probable that the lay peers would be allowed to join in the judgment of the House, as a court of law, still, in fact, their *right* remains intact, as we have it upon the high authority

of the present Lord Chief Justice of England, that there is no distinction between law lords and lay lords known to the constitution.

And, to return to the appellate jurisdiction, *as usually exercised* by the law lords, we have seen of whom that court is constituted:—the Lord Chancellor is the only functionary who sits there with the insignia of the office of a judge; the other law lords attend or not at their pleasure; their services are gratuitous; and they possess only the ordinary rights of peers; nor is the Lord Chancellor a necessary member of this high court; or are any particular number of acting peers necessary. Should there be but one or two the judicial business proceeds, the extra number required to form “a House” being filled up by the presence of two or three lay peers, who are mere dummies—judicial John Doe’s and Richard Roe’s; but (as Blackstone has it), “in whose honour and conscience the law reposes an entire confidence,” though they seldom even know the nature or name of the case before them, and usually spend their time in an offending slumber. What must a foreigner’s feelings be, who comes with exalted notions of the grandeur and perfection of the British constitution, when told that those recumbent figures are the hereditary judges of the High Court of Parliament, of which Lord Coke hath said:—

“*Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem est capacissima.*”

(The learned reader will understand that this panegyric was applied to parliament *generally*).

Again, sometimes, only two law lords, often the Lord Chancellor and another, sit upon appeals from, and, perhaps, reverse the decrees of the two Lords Justices of Appeal in Chancery, whose decision may have affirmed that of the Master of the Rolls, or one of the Vice-Chancellor’s: men in every respect, as judges, their equals, often their superiors. Well, in this case we have two judges reversing the decisions of three? What can be a greater farce? Nay, is it not a mockery of justice? But by going back only so recent as the year 1850 we actually have one noble and learned lord *alone* presiding in, and conducting the judicial business of this august court, and reversing the decision of a Vice-Chancellor; a complete master of the details and science of equity and jurisprudence; who had spent a laborious life in mastering its principles and applying them to the great cases coming before him in his every day practice.

There were many of these cases thus disposed of, but the one to which I particularly allude, is well known to the profession as “*Upfill’s Case*,” decided in August, 1850, by Lord Brougham, who was then

labouring sedulously, unaided, in the House of Lords, with that unbounded zeal for the good of his country, for which he is entitled to especial homage from us all; but can it be right that one, even with his talents and quickness, should sit alone and in appeal on the decrees of a lord justice, Knight-Bruce, or Turner, or a Vice Chancellor Wood; men whose lives have been devoted to the study of that peculiar branch of the law? Surely, all will allow that the court appealed to, should be superior to that appealed from; and that the court of ultimate appeal should be superior to all other courts. I say, the actual absurdity of such a state of things must be patent to all, and, also, that such a system is capable of being easily amended by having stationary and responsible judges: men who can do the best work, and who should consequently be paid the best price; or, in short, by calling together the collective judicial talent of the several superior courts. It might be answered by some that in matters of common law the judges are called in to give their advice, but to this it could be rejoined, that the House is not bound to adopt, and act upon, this advice, though emanating from so great a source; and, further, in appeals from the courts of equity, the aid of the equity judges is not called in; and the decisions of these most learned men are often reversed by those who have never in their lives practised in their courts, by common law lawyers who swear by Lord Coke, not by the sages of equity lore!

We purposely avoid entering into any discussion as to the propriety of separating the judicial from the political duties of the Chancellor, which is of itself a large field for discussion and enquiry, except to mention that by recent alterations in judicial offices, and the appointment of the two Lords Justices of Appeal in Chancery, the first step has been taken to lessen his judicial, and, probably, thereby to increase his political duties; and to express an opinion how serviceable it would be (should any more severe change be deemed contrary to the peculiar genius of the constitution) to withdraw him altogether from the Court of Chancery, leaving in his stead the Lords Justices, and place with him a competent staff of eminent judges conversant with the different branches of the law in the House of Lords, or in some other way to constitute a permanent and satisfactory Court of Appeal, so that we should no longer hear of such anomalies as lay peers wishing to set at nought the conclusions of the greatest authorities of our time: two judges reversing the decrees of three; English judges, unacquainted with Scotch law, reversing the decision of eminent Scotch lawyers; or common lawyers reversing the decrees of equity judges, and such like absurdities, which

would shock an intelligent Frenchman were he to institute a comparison between our much vaunted court of ultimate Appeal and the French court of Cassation.

But let us pause to enquire whether those noble and learned lords, who were so fired with indignation at the remarks of the Solicitor-General (which, after all, one would think were not much out of place), were not aware, or *had not been aware at an earlier period of their career*, of the inadequacy of the House of Lords as a court of appeal; nay, had not themselves considered the subject with a view to remodel, or materially alter its constitution and mode of procedure. Let any one turn to Lord St. Leonards' "Law of Property, as administered by the House of Lords," and read the "Introductory Chapter" of that work, and he will soon find his lordship's opinion, as there expressed, to agree with that of the Solicitor-General; he will find that that consummate judge—than whom, indeed, there can be no greater—in discussing the manner in which O'Connell's appeal was conducted, after referring to the subject at some length, writing thus:—"The judgment was, therefore, reversed in the Lords upon the single judgment of one of the three last-named lords" (meaning Lords Brougham, Cottenham, and Campbell). "So that in every other court of justice the judgment would have been supported. This is not a desirable state of things; it is not the way in which the country would long rest content, with the administration of justice in the ultimate court of appeal." Again, after saying that none of the law peers assume any judicial costume, he proceeds:—"This is not a trifling point; for if a man is sitting as a judge, in the dress of one, he is necessarily confined to the duty he undertakes, he cannot with propriety engage in a general conversation with those around him: he cannot listen to part of the argument and then leave the House for a time, and read a note of the remaining part of the argument;" he then goes on to show "that the law lords should, in assuming the attributes of judges, submit to such form and duties as would satisfy the suitor that they do effectually fulfil the duties of judges." See these sentiments still more strongly expressed by the same great authority, in the House of Commons, in 1841, Hansard, vol. 56 (3rd series), 195.

Surely all this is strongly against the sufficiency of the constitution of the House of Lords as a court of appeal, but we go on further and find the essential question itself asked, "*Has the House of Lords satisfactorily performed its functions as the ultimate Court of Appeal?*" and a little further on this question is thus answered:—"The constitution of the House of Lords, as a court of appeal, is as we have

seen, not such as is likely to lead to the desired results."

Again (at page 43), "An *effective* court of appeal is a necessity; it can no longer be dispensed with. This was said in 1833, and I venture now to repeat it." And he concludes his examination of the subject by a statement of the various plans proposed in Parliament in late times for improving the appellate jurisdiction, one of which he himself brought before the House of Commons, which was, in effect, to abolish the court of review (which now no longer exists), and judicial committee of the Privy Council, and to add to the court of appeal in the House of Lords two Lords President to hear appeals, with as many of the forms and regulations of the superior courts of justice as were consistent with the jurisdiction and authority of the House. (See also Sugden's letter to Lord Melbourne, 1835). The same subject has also been under the consideration of Lords Lyndhurst, Brougham, and Cottenham, each of whom has proposed some measure to remodel the appellate jurisdiction of the House; and Mr. P. Cooper, an eminent lawyer and author, in a work published in 1828, proposed "that the House of Lords should abandon a jurisdiction which they have been incompetent to exercise ever since its first acquisition."

Your "unlearned" readers will, doubtless, feel some surprise that those who strenuously advocated the necessity of these amendments should now be so sore with a person occupying the position of the Solicitor-General—one of the most eminent counsel of the day, having one of the largest, if not the largest practice—for illustrating his subject, viz.: the further amendment of the procedure of the Court of Chancery, by an apt allusion to the required amendment of the House of Lords as a court of appeal. Why should not Sir Richard Bethell, in 1855, repeat what had been urged by Sir Edward Sugden in 1825? The former evidently thinking (and who does not agree with him?) that the High Court of Chancery is more efficient as a court of appeal than the House of Lords. The latter, then, in 1825, thought that when the Lord Chancellor appealed from himself to the House of Lords it was like the appeal of the ancient Grecian from "Philip drunk to Philip sober," with *one small exception*, that the appeal in the Chancellor's case was from "Philip sober to Philip drunk." Surely Lord St. Leonards has not cited his opinion upon a subject that has caused him so much laborious consideration, as he could justly be likened to another gifted person (of a different country and sex), who wrote a heart-stirring and universally-admired book upon slavery in the American States, and then so easily forgot the evils of the system which she had so magnifi-

cently exposed as to become the patron of the white slavery of England. However, old age, we know, brings with it an antipathy to change, and a love of existing institutions, or, as it has been eloquently said of one who forms an extraordinary exception to the axiom—himself our greatest labourer in the field of law reform:—

“Some men are strongly prejudiced in favour of a system under which they have been born and bred; they love the mysteries in which they have spent so much time in learning, and they do not like the rude hand which would sweep away the cobwebs, in spinning which they have spent their toil, their days, perhaps for half a century.”

But while the scruples of such men are receiving just attention, we cannot allow human affairs to stand still any more than that the sentiments of their old age should blot out the recollection of their past greatness.

Who can deny that, in this great age of progress which has developed the vast power of steam, and by means of the electric wire, enabled us to hold converse with our fellow creatures the other side of the universe—the amending hand should be raised to eradicate and uproot the evils of our juridical system, the rude and crude devices of our forefathers, M-adapted to the refinement of modern tastes and requirements of modern society.

The unreformed institutions of our once famous Alfred, though sufficient for the period when they were used, would be intolerable now; and such would be the effect of many laws now unrepealed, but practically obsolete. The edifice of public justice may be grand and imposing when viewed from a distance; admirable are its general features, useful are the workings of its inward machinery, but when each part is brought into separate operation, there are deficiencies, which, if seen with the whole, are laid open to the naked eye.

Our system of jurisprudence is revered by us, not as presenting an almost perfect theory, but as presenting the means to attain the ends of positive and substantial justice; to take from him who unjustly holds; to restore to him who has been unjustly deprived; in fine, knowing that all human institutions must necessarily be imperfect, it should be our aim to attain some practical good, which can only be obtained by a careful review of our ancient constitution and laws, by men sufficient for the great occasion; and should those who have arrived to the highest pinnacle of power, ignore the principles of their middle life, of their mental manhood, we must look to the press—that great engine of civilisation—to popularise the subject; to bring it down to the understanding of men of common sense; for there are few branches of our law that do not require

more or less revision, but so long as the press throws its electric light upon the subject, we do not despair of obtaining an ample meed of law reform. Some early instalment of which I sincerely trust will provide some efficient remedy for what I think has been shown to constitute a glaring defect in the constitution and procedure of the greatest tribunal known to our law. I remain, sir,

Your obedient servant,

Bromsgrove, Sept. 11, 1855.

B. H. S.

NOTES OF LEADING CASES.

BANKRUPTCY.—*Proof—Contingent liability—12 & 13 Vict. c. 108, s. 178—Liability to pay money at several times on several contingencies—Certificate no bar—Policy of assurance—Covenant to pay premiums and to repay premiums paid by covenantee [Young v. Winter, 25 Law Tim. Rep. 163; Warburg v. Nicker or Tucker, Week. Rep. 555; S. C. 1 Jur. N. S. 871].*—The two cases just cited, the former being in the Common Pleas, and the latter in the Queen's Bench, are in conflict upon a point of extreme importance connected with the liability of a bankrupt, to pay after his certificate future premiums on a policy of assurance on his own life, which, prior to his bankruptcy, he had assigned and covenanted to pay the annual premium, and if he did not then, that he would repay the assignee of the policy all moneys which he should pay for such premiums. In the former case, the Court of Common Pleas held that the bankrupt was discharged from his covenant to pay the premiums, by secs. 177 and 200 of the Bankrupt Consolidation Act (the 12 & 13 Vict. c. 106); but that he was liable on his covenant for not keeping up the policy. In the latter case (*Warburg v. Tucker or Nicker*), the Court of Queen's Bench held that the bankrupt was liable both for not keeping up the premiums and for not repaying the amounts paid for premiums by the assignee of the policy. The question turns on sec. 178 of the Bankruptcy Consolidation Act, which enacts “that if any trader, who shall become bankrupt after the commencement of this act, shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not proveable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit; and after the contingency shall have happened, and the demand in respect of such liability shall have

been ascertained, he shall be admitted to prove such demand, and receive dividends, with the other creditors, and, so far as practicable, as if the contingency had happened, and the demand had been ascertained before the filing of such petition, but not disturbing former dividends, provided such person had not at the time such liability was contracted notice of any act of bankruptcy by such bankrupt committed: provided also, that where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees, at any time after the expiration of such time, and if the court shall think fit, be expunged, either in whole or in part, from the proceedings." The 200th sec. of the same act provides that the certificate is to discharge the bankrupt from all debts due by him when he became bankrupt, and "from all claims and demands made proveable under the bankruptcy." In *Young v. Winter* it appeared that the defendant being indebted to the plaintiff, and, to cover further advances, assigned to him a policy of assurance on the defendant's life, and covenanted to pay the annual premiums; and, if he did not, that the plaintiff might pay them, and the defendant would repay the plaintiff with interest. The defendant afterwards became bankrupt and obtained his certificate. A premium accruing due after his bankruptcy and being unpaid by the defendant, the plaintiff paid it and sued the defendant upon his covenant for not keeping up the policy by paying the premium, and for not repaying the plaintiff; it was held, on demurrer to the defendant's plea of bankruptcy, that the defendant was not discharged from liability as to the first breach of covenant by the above secs. 178 and 200 of the Consolidation Act, but was as to the second breach. According to the report, there was no judgment, but the court made various remarks during the course of the arguments. In the other case of *Warburg v. Nicher or Tucker*, an elaborate judgment, which we shall notice presently, was delivered, to the effect that a demand arising upon an undertaking, which creates a liability to pay money at several different times, if several contingencies shall happen at those several times, is not a demand proveable in the Bankruptcy Court, under the above 178th sec., and is not therefore barred under the 200th sec. by a certificate of conformity. In that case the declaration set out a deed by which the defendant, as a security for a debt due from him to the plaintiff, assigned to the plaintiff three policies of assurance, and covenanted to pay the annual premiums, and that if he should neglect to make such payments, it should be lawful for the plaintiff to pay the pre-

miums, and that the defendant would on demand pay to the plaintiff all moneys so paid. The declaration then assigned two breaches, viz., first, that the defendant did not pay the premiums; secondly, that the plaintiff paid them, and yet the defendant had not repaid the plaintiff on demand. The defendant put in a plea of his certificate, under an adjudication of bankruptcy, obtained subsequently to the execution of the deed of assignment. On demurrer thereto by the plaintiff, the court held the certificate to be no bar. In delivering the judgment of the Court of Queen's Bench, Lord Campbell said:—

"Successive bankrupt acts have progressively increased the classes of demands to which a certificate under a bankruptcy is a discharge; and the framer of the last act seems to have wished that by the new section which he has introduced a certificate should be a bar to all liabilities whatever arising before the bankruptcy, so that the certificate should enable the bankrupt to start a new man, without the risk of any claim rising up against him in respect of any contract, obligation, or engagement he had ever entered into before his bankruptcy, however great the difficulty might be in enabling those who had or might have future or contingent or unliquidated claims upon him to come in under the bankruptcy, and, proving the probable value of their claims at the time of the bankruptcy, to receive along with the other creditors a proportional dividend. A considerable progress has been made in extending the protection of the certificate to antecedent demands, but the object does not yet seem to us to be completely effectuated; and we think the liability in respect of which the present action was brought still remains undischarged.

"By deed between these parties, the defendant, as a security for a debt of £2,450 due from him to the plaintiff, assigned to the plaintiff three policies of assurance—one for £1,000 on the defendant's own life, under the annual premium of £46 Os. 10d.; another on his own life for £500, under the annual premium of £23 16s. 3d.; and a third on the life of his wife for £1000, under the annual premium of £50 19s. 2d., and he covenanted punctually to pay the annual premiums on the policies assigned, and it was declared that if he should neglect to make such payments, it should be lawful for the plaintiff to pay the premiums which might become payable for keeping on foot the said policies respectively, or for effecting or keeping on foot any other policy or policies in lieu thereof, and that the defendant would, on demand, pay to the plaintiff all monies so paid, with interest. The declaration in very general terms assigns two breaches—first, that the defendant did not pay the premiums on the policies; and,

secondly, that although the plaintiff had advanced the premiums to keep the policies on foot, the defendant had not, on demand, repaid him the amount. To the whole declaration the defendant pleads his certificate under a fiat in bankruptcy sued out against him subsequent to the execution of the deed, without even alleging that it was subsequent to the breaches.

"It appears to us quite clear that the certificate can be no bar as to the first breach. The covenant to pay the premiums of assurance on the three policies did not constitute 'a liability to pay money upon a contingency.' The covenant is absolute, and the machinery provided for admitting a claim and proof under this section is wholly inapplicable to such a demand.

"Although there may be more doubt as to the second breach, we think that on this likewise the plaintiff is entitled to our judgment. We do not consider the objection relied upon by the plaintiff's counsel, that the covenant from which the demand originates was to pay money to the assurance offices, and not to the plaintiff personally, to be fatal. The statute speaks of 'a liability contracted by a bankrupt to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained, before the filing of the petition,' without saying that the liability must be to pay directly to a creditor. Here the payment ought to have been by the defendant to the assurance offices, but for the benefit of the plaintiff as a creditor, that the security for his debt might be preserved; and the plaintiff having himself paid the premiums, or having re-assured after the policies assigned had been forfeited, the defendant was directly to repay him the amount of the sums so advanced, with interest. But we do not think that provision is made by the section for a case like this, where there are to be successive payments on successive contingencies during the whole of the lives of two individuals, and the life of the survivor. The plaintiff, in seeking a remedy under the fiat, must first have made a claim for such a sum as the court should think fit. It is difficult to say on what principle the court could proceed in fixing this sum. But supposing a sum to be fixed, insuperable difficulties present themselves before the plaintiff could be entitled to receive dividends with the other creditors. The successive contingencies here on which the defendant becomes liable in consequence of the breach of the covenant are the non-payment by the defendant of the annual premium from year to year on each of the three policies, the plaintiff paying these premiums, or re-assuring after the policies were forfeited, and the plaintiff making a demand upon the defendant for the amount of the

money so advanced. But the section seems to contemplate only the happening of one contingency, whereupon the whole demand in respect of the liability shall be ascertained; and thereupon he shall be admitted to prove such demand, and receive dividends with the other creditors. Suppose that there had been a single default on the part of the defendant in non-payment of one annual premium on one policy, it would only be by reason of this default that the plaintiff could make a demand and be entitled to a dividend. Notwithstanding the defendant's bankruptcy and certificate, he might pay or cause to be paid all the other premiums according to his covenant, and the contingencies on which subsequent payments were to be made by himself to the plaintiff might never happen. The section seems to contemplate and to make provision only for one demand, depending upon the happening of one contingency.

"The question here is, whether the certificate is a bar in respect of payments made by the plaintiff by reason of any and all breaches of the covenant which had occurred before the bringing of this action, or which may occur at any time during the lives of the defendant and his wife, or the life of the survivor. Now, for the happening of subsequent contingencies, on which a fresh liability under the covenant would attach, no provision appears to be made; so that there could be no further proof, and for subsequent breaches no division could be obtained. The words 'so far as practicable' occur, but they are only applicable to the receipt of dividends by reason of one contingency having happened.

"Our attention was likewise properly drawn to the words in the proviso, 'that where any such claim shall not have, either in whole or in part, been converted into a proof within six months,' &c., the claim may be expunged. But this appears to us to refer only to successive proofs upon the happening of one contingency in respect to one demand, and not at all to justify successive proofs upon successive contingencies for a long or indefinite period of time. Indeed, this construction would be wholly inconsistent with the established procedure under the bankrupt laws, whereby the property of the bankrupt is equally distributed among all his creditors, and the duties of the assignees and all acting under the fiat are with reasonable dispatch to be brought to a conclusion. In any attempt to admit the covenantee in such a case to have a value put upon the whole covenant, and to receive dividends with the other creditors, the difficulties appear equally insuperable as those which induced the Court of Common Pleas to hold in *Thompson v. Thompson* (2 Bing. N. C. 168), and this Court in *Amott v. Holder* (17 Jur. 318), that the surety for

the payment of an annuity was not discharged by his certificate.

"It appears to us, therefore, that to effect the complete discharge of a bankrupt from all liability in respect of such a deed as this, the further interposition of the Legislature is still necessary; and that in this case we are bound on both breaches to give—Judgment for plaintiff." *Young v. Winter*, 25 Law Tim. 163.)

BANKERS.—*Liability of in case of payment of forged order or cheque of customer* [vol. i. p. 241].—*Negligence of customer in facilitating forgery, by carelessly keeping documents, seal, &c.*—*Payment on forged documents* [*Bank of Ireland v. Evans' Trustees*, Week. Rep. 573; S. C. 25 Law Tim. Rep. 272].—This case, which was a decision of the House of Lords from the Irish Courts, furnishes an apt illustration of the rule stated 1 Chron. p. 241, that payment on a forged cheque or order is not a payment as between the banker and the customer whose name is forged, unless where the forgery has been committed by reason of the want of due caution on the part of the customer. This is the doctrine of *Young v. Grote* (4 Bing. 258). In the case of *Coles v. Bank of England* (10 Adol. and Ell. 437), the subsequent conduct of the customer was held to amount to a ratification of the forged transfers, but this case is a doubtful one, as will presently be seen. The case of the *Bank of Ireland v. Evans' Trustees*, also illustrates the doctrine of negligence which we have before referred to as affecting the rights of a party to sue where he has been the inducing cause to the injury or wrong (*ante*, p. 92). It there appeared that a corporate body (the plaintiffs in the action) having stock standing in their names in the books of the Bank of Ireland (the defendants in the action), gave their common seal into the custody of their secretary, who then fraudulently, from time to time, during a period of four years, affixed the seal to powers of attorney, authorising the transfer by degrees of the stock; procuring also for each of such forged powers the attestation (as required by statute) of two persons that the seal of the corporation had been duly affixed. Held, affirming the judgment of the Irish Exchequer Chamber, that the negligence, if any, of the corporation, in the custody of their common seal, was too remotely connected with the transfers to preclude them from alleging, as against the bank, that the transfers were invalid, for the negligence to disentitle the plaintiffs to recover must be in or immediately connected with the transfer itself. On the trial, the Irish Lord Chief Justice directed the jury that if they believed the evidence offered by the plaintiffs in support of the issues, the said five documents purporting to be powers of attorney were all forgeries; and that,

believing them to be so, they were bound to find a verdict for the plaintiffs, unless they should be of opinion upon the evidence and come to the conclusion that the use made of the common seal of the corporation, whereby the defendants were imposed on and defrauded, was caused exclusively by the neglect or default of the plaintiffs, and in that case the jury should find a verdict for the defendants; and his Lordship instructed and told the jury that in considering whether the use so made of the common seal of the plaintiffs was the exclusive cause of the imposition and fraud practised on the defendants, they should consider whether there was any neglect or default on the part of the defendants in examining the said powers of attorney or inquiry into their genuineness, and that if they were of opinion that that there was such neglect or default, and the same in any degree contributed to the said imposition and fraud, they should find for the plaintiffs. And counsel on behalf of the said plaintiffs then and there objected to the said charge, and submitted that the said chief justice ought not so to have charged the jury, but should, on the contrary, have told them, and the counsel for the plaintiffs called on and required his Lordship to tell the jury, that if they believed that the said documents purporting to be powers of attorney were forgeries, the jury should find for the plaintiffs, notwithstanding the evidence adduced and relied on in support of the allegation of such default or neglect on the part of the plaintiffs; but his Lordship then and there refused so to charge the jury; and counsel on behalf of the plaintiffs then and there further called on and required the chief justice to inform and direct the jury that, if they believed upon the evidence that the plaintiffs did not previously authorise, and were not privy to the affixing of their common seal to the said alleged five powers of attorney, or any of them, and did not by any subsequent act adopt the said powers of attorney, or any of them, or the transfer of the stock of the said plaintiffs, made under the authority or colour of them, or any of them, they should find for the plaintiffs. Referring to this summing-up, B. Parke (who delivered the opinion of the judges summoned to hear the arguments), said, "Without adverting to the former part of the summing-up, upon which many criticisms have been made, we think the last part cannot be supported. The Lord Chief Justice evidently means that, though the instruments were forgeries, there was evidence adduced on the part of the defendants of such default or neglect on the part of the plaintiffs as to warrant a finding for the defendants. Now, we all concur in opinion that the evidence given, which was only of a supposed negligent custody of their corporation-seal by the

trustees, in leaving it in the hands of Grace, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiff was disentitled to insist on the transfer being void. We concur with Jackson, Ball, Crampton and Torrens, JJ., and Lefroy C. J., in thinking that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid, must be negligence in or immediately connected with the transfer itself. Such was the case of *Young v. Grote*, 4 Bing. 253, on which great reliance was placed in the argument at your Lordship's bar. In that case it was held to have been the fault of the drawer of the cheque, that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment. The present case is entirely different. If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed. It is quite impossible that the bank could have maintained an action for the negligence of the trustees, and recovered the damages they had sustained by reason of their having made the transfer. If such negligence could disentitle the plaintiff, to what extent is it to go? If a man should lose his cheque-book or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant or stranger took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal? It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney. Much reliance was placed, in the course of the argument, on the case of *Coles v. The Bank of England*, 10 Ad. & Ell. 497, as an authority for the admission of evidence of negligence not immediately connected with the particular transfer. The

case furnishes no such authority. On considering the judgment of Lord Denman, it seems clear that the court adopted the argument of the counsel for the bank, that the principal question was, whether it could be made liable to replace stock transferred by a person professing to act for the proprietor, after the proprietor has recognised the transfers by receiving dividends on the reduced amount. This negligent conduct of the plaintiff in receiving dividends on the sum to which the stock was reduced by a forged transfer, was treated by the court as evidence of ratification of those transfers by which the stock was reduced to that amount; and on that ground the court seems to have proceeded. Nothing of that kind occurred in the present case. Whether that case is altogether satisfactory, is not a matter to be now considered by us. It is enough to say that it does not apply to the case now before your Lordships." And the Lord Chancellor said: "The direction of the very learned judge who tried the case was clearly not warranted by law. This direction was, that if the transfer was caused by such negligence as that of which evidence has been given on the part of the corporate body, then that the bank were absolved. I apprehend that there is no such principle of law. I think it has been fairly put (whether in the argument or in some case, I forget) that there must be either something that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer. Now, the case of *Young v. Grote* went upon that ground (whether correctly arrived at in point of fact is immaterial), that the plaintiff there was estopped from saying that he did not sign the cheque for £350. And if the circumstances are such, whether arising from negligence or from any other cause, that, as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that, as between them, is just the same as if he had signed it. Therefore, taking that view of the facts, the case may be well sustained, and appears to have been well decided. The other doctrine, that of ratification, is well illustrated by the case of *Coles v. The Bank of England*. There the court of Q. B. considered that the conduct of the owner of the stock, in subsequently signing from time to time receipts for reduced sums, when the sums had been reduced by previous forgery, was in truth a ratification of what had previously taken place. Whether I should have arrived, upon the question of fact, at the same conclusion, is a matter upon which I do not feel myself called upon to speculate. That certainly seems to me to be rather a strong result. But, coming to that result, the consequence naturally and necessarily followed, whether forgery or no

forgery, that, if the party injured by the forgery chooses subsequently to ratify what has been done, then, as between him or her and the person who acts upon it, the ratification would be just as good as if it had been the previous act of the party."

SOLICITORS PRACTISING IN COUNTY COURTS—PRISON INSOLVENCIES.

A case, reported in the daily papers of the 8th of August, of an application to the Insolvent Debtors' Court in London by a country solicitor, for leave to practise in prison insolvencies in the County Court at Maidstone, has attracted attention to what by some is considered as an injustice to the body of practitioners, excepting the privileged few. It appeared that the judge of the County Court at Maidstone, in compliance with what we believe is a very common rule with other County Court judges, had limited the practice in prison insolvencies there to two attorneys, which, it was alleged, amounted to granting them a monopoly, and contrary to the spirit, if not the letter, of sec. 27 of the Solicitors' Act, the 6 & 7 Vict. c. 73, by which any person admitted in the Superior Courts is entitled, on producing his admission therein, to be admitted as an attorney in any other of the said courts, or in any inferior court of law in England and Wales, upon signing the roll of such other court, and shall thereupon be entitled to *practise* as an attorney therein in like manner as if he had been sworn in and admitted an attorney of such court. The chief commissioner, however, held that the court had a discretion to admit fit and proper persons only, and that the court will not admit an attorney to practice in prison insolvencies in the country without the recommendation of the County Court judge of the district. The chief commissioner in his judgment in this case (which has since been reported in 25 Law Tim. Rep. 318), said:—

"That he quite concurred that everything done in insolvency should be done by respectable men practising in other courts; but if this motion was meant to alter the practice of the court in country cases as to the admission of attorneys, he would not do so without consultation with his learned brethren. He might, however, comment on this particular case, and the causes which led to the very special manner in which the court had dealt with these country applications. While the commissioners went the circuits themselves, they had opportunities of noticing the practice of all country attorneys. Of course, men living at Carlisle would practise in the gaol there; and so it was in other towns in which gaols were situated, and it was thought highly expedient for the benefit of the prisoners, that there should be a

limit to the number of persons practising. But there was a great difference of opinion in some parts of England amongst attorneys, as to the desirableness of engaging in this practice. In some places no respectable man would go into a gaol, but there was no such feeling in other places. The commissioners, therefore, exercised a discretion according to the circumstances of the place. If there were men who did their business well, they were anxious to continue them. When the Protection Acts were introduced, some alterations were made in that court as to the admission of attorneys. All persons, whether prisoners or not, might then come to the court on very short notice; and it was thought reasonable to enable parties so situated to employ their own attorneys. In London the practice in these courts was consequently thrown open to the profession, and that being so in protection cases, they could not make a distinction in prison cases. But, with respect to country cases, as the commissioners no longer went on circuit, they could have no personal knowledge of the respectability of practitioners or the circumstances of the localities, and they had to trust, as a matter of necessity, to the recommendations of the judges of the Co. Courts. The applications were usually dealt with by the chief clerk; but in his absence he had sent for his book, which he found contained some ingredients not mentioned in this affidavit. On the 13th of June the petition to which he alluded was filed, and the applicant then applied to the judge of the Co. C., and all that he is reported to have said was, that he was satisfied with the practitioners there. An application was then made to him for leave to act in a particular case at Maidstone, and he supposed that for good reasons the application was granted. Mr. Stoddart went to Maidstone and did the business, and there the matter ended. He was not going to make general rules without good cause shown for altering the existing rules. The learned counsel had only brought forward suggestions to illustrate what was called a grievance. There was nothing in the affidavit about this attorney residing at Maidstone, and he did not see anything that illustrated in the smallest degree what was called a grievance. The motion would, therefore, be refused, and the rules of the court must be complied with.

SOLICITORS' RETAINERS IN EQUITY PROCEEDINGS.

The courts have frequently shown a great inclination to fix a liability on solicitors, and in no matter, perhaps, more so than in the case of retainers by their clients. The rule laid down is that, if any question is raised by a party to a suit respecting the

employment by him of a solicitor, the retainer must be produced by the latter, otherwise the court will consider that there has been no employment, unless, indeed, the solicitor can show a clear case of acquiescence on the part of the client in the proceedings taken by the solicitor. Thus, in the case of *Knight v. Pinner* (6 Beav. 174), the master of the rolls held that a solicitor ought, before filing a bill, to take written instructions from all the parties to it, and if he fill a bill with the authority of some only, the party who has not given any authority, may apply to have his name struck out of the bill, and the solicitor will be ordered to pay the costs. Where, indeed, the alleged client is the sole plaintiff in the bill, the application is to dismiss the bill, and for payment of the costs as between the solicitor and client by the solicitor filing the bill. This was so done in *Allen v. Bone* (4 Beav. 493), referred to presently. In the above cited case of *Knight v. Pinner*, or *Pinner v. Knight*, a motion was made to have the name of Thomas Knight struck out of the bill as a plaintiff, on the ground that the suit had been instituted without his authority, he never having heard anything about it till just before the application. It appeared that a Mr. Galsworthy, as the solicitor for the plaintiffs, had filed the bill at their request; he had not got the written consent of Thomas Knight, but his brothers, the co-plaintiffs, had given him instructions on behalf of all, and in this he understood that Thomas Knight had acquiesced. Lord Langdale expressed himself as surprised that a solicitor should venture to file a bill on behalf of a party without a previous consent in writing. He said that solicitors were bound to get such an authority, and though the interests of their clients sometimes induced them to file a bill without it, still they did it at their own risk. He admitted that they were not always to blame for this course. It was, however, most imprudent for them to proceed without getting the requisite authority, because if any question respecting the institution of the suit was raised, it was absolutely necessary that it should be produced, and if it could not, the solicitor must prove that the client acquiesced in what was done. In that case, it appeared that the solicitor had held no communication with Thomas Knight; he was, however, exposed to risk by trusting to his brothers. It was impossible, however, the master of the rolls said, for the court to arrive at the truth, and as the solicitor had not made out his case, he must suffer; any supposed advantage to the parties could not be considered. This party had a right to say that the suit should not be instituted in his name. As to the costs, the solicitor might perhaps obtain them from those who gave the instructions; but as no authority for

filing the bill was proved, and as it did not appear that Thomas Knight had acquiesced, his name must be struck out of the record as a plaintiff, but the remaining plaintiffs must have leave to add his name as a defendant. The costs of this motion must be paid by the solicitor personally. The recent case of *Atkinson v. Abbott* (25 Law Tim. Rep. 314), decided by V. C. Kindersley, may be considered as having carried the rule of the court as to the retainer to the extreme of harshness against the solicitor, and it cannot but be useful to note it here for the benefit of our readers, lest they should unwarily fall into a similar trap. It appeared that a solicitor obtained a written retainer from a client authorising him to proceed against the trustees and executors of his client's father's will, to obtain the probate thereof, and to take such proceedings as might be considered expedient to obtain an account of the trust property under the will; the solicitor accordingly took proceedings in the Ecclesiastical Court, and afterwards filed a bill in an administration suit in the Court of Chancery on behalf of his client. Subsequently the client moved to take the bill off the file, as having been put on without proper authority. It was held that such written retainer did not authorise the institution of a suit in this court, and that the bill must therefore be taken off the file accordingly, on the same terms as we have above seen were imposed in *Allen v. Bone* (4 Beav. 493). The V. C. also laid it down as a rule in such cases that if a solicitor relies upon a written retainer as an authority for instituting a suit in the Court of Chancery, the retainer should explicitly and clearly state such object (*Atkinson v. Abbott*, 25 Law Tim. Rep. 314). His Honor said: "With reference to Lord Langdale's observation in *Allen v. Bone* (4 Beav. 493), the retainer or written authority given by a client to his solicitor, ought, in a case of this kind, to be not merely one "to take the account," but to institute a suit for that purpose. That is if a suit is instituted to take the accounts of the estate of the testator, a written authority for that should be shown by the solicitor. A solicitor would not be doing his duty if he took from an ignorant client a vague authority for such a step. The instrument upon which he acts should be substantially clear, plain, and explicit. But what are the surrounding circumstances of this case? The testator died in 1821, having devised and bequeathed his real and personal estate to two persons named Abbott and Stephenson, as trustees and executors, and the final distribution of the property was to be when his youngest child attained the age of twenty-one. When the retainer was given by the plaintiff to Brackenbury, the executors had not proved the will; they had not then, or at all events had not

from 1821 to 1852, given any account to their cestuis que trust of the testator's estate. No account appears indeed, so far as I can see, to have been ever rendered by them. Well, in that state of circumstances, the plaintiff gives Brackenbury the retainer. That retainer is, I think, a sufficient authority to him to institute a suit to obtain probate in the Ecclesiastical Court, and to take such proceedings as may in that court be necessary to an account. But it was said that the account sought could only be obtained in an administration suit, That the Ecclesiastical Court could not take cognizance of such a suit, and, therefore, that the retainer must have meant to authorise a suit in this court. That is an interpretation however, which I think no unprofessional man would put upon the language of this retainer, and it is one which the plaintiff certainly did not put on it. The retainer then appears to authorise no more than the taking of proper steps for probate and an account in the Ecclesiastical Court. Brackenbury himself seems so to have in reality considered it; for when he had obtained it and the suit in the Ecclesiastical Court was abandoned, he did nothing till he filed this bill two years afterwards without any consultation with his client in the meantime. If Brackenbury had applied to the executors and they had rendered an account independent of the suit in the Ecclesiastical Court, the retainer would have been satisfied. It appears to me, then, that this retainer was no authority for filing this bill. I do not mean to say that no retainer can under any circumstances authorise a solicitor in filing a bill without specifically and in terms so stating; but I do say, that if a solicitor relies upon a written retainer as an authority for instituting a suit in this court, the retainer should explicitly and clearly state such an object. I have said that I think there was no acquiescence on the part of the plaintiff in Brackenbury's proceedings here, and as this retainer did not authorise him to file this bill, I must declare that this bill be taken off the file on the same terms as in *Allen v. Bone*."

**NUISANCES REMOVAL ACT (18 & 19 Vic.
c. 121; ante, pp. 84, 85).**

We have noticed the principal provisions of the act of last session (cap. 121), being the act to consolidate and amend the Nuisances Removal and Diseases Prevention Acts, 1848 and 1849,—i. e., the 11 & 12 Vic. c. 123, and the 12 & 13 Vic. c. 111, but we deferred to the present opportunity a notice of those provisions of the act which relate to the procedure for putting it in force, and compelling obedience thereto. The most important of these relates

to the service of notices, summonses, and orders (sec. 31), proceedings taken against several persons for the same offence (sec. 33), or against one or more of several joint owners (sec. 34), that proceedings shall not be quashed for want of form, nor be removed by certiorari (sec. 39), and that appeals under the act shall be to the quarter sessions (sec. 40). As these are very important practical matters, we will here give the provisions in *extenso* :—

SEC. 31. Service of notices, summonses and orders.—Notices, summonses, and orders under this Act may be served by delivering the same to or at the residence of the persons to whom they are respectively addressed, and where addressed to the owner or occupier of premises they may also be served by delivering the same or a true copy thereof to some person upon the premises, or if there be no person upon the premises who can be so served, by fixing the same upon some conspicuous part of the premises, or if the person shall reside at a distance of more than five miles from the office of the inspector then by a registered letter through the post.

SEC. 33. As to proceedings taken against several persons for the same offence.—Where proceedings under this Act are to be taken against several persons in respect of one nuisance caused by the joint act or default of such persons, it shall be lawful for the local authority to include such persons in one complaint, and for the justices to include such persons in one summons, and any order made in such a case may be made upon all or any number of the persons included in the summons, and the costs may be distributed as to the justices may appear fair and reasonable.

SEC. 34. One or more joint owners or occupiers may be proceeded against alone.—In case of any demand or complaint under this act to which two or more persons being owners or occupiers of premises, or partly the one or partly the other, may be answerable jointly or in common or severally, it shall be sufficient to proceed against any one or more of them without proceeding against the others or other of them; but nothing herein contained shall prevent the parties so proceeded against from recovering contribution in any case in which they would now be entitled to contribution by law.

SEC. 39. Proceedings not to be quashed for want of form.—No order, nor any other proceeding, matter, or thing done or transacted in or relating to the execution of this Act, shall be vacated, quashed, or set aside for want of form, nor shall any order, nor any other proceeding, matter, or thing done or transacted in relation to the execution of this Act, be removed or removable by certiorari, or by any other writ or process whatsoever, into any of the Superior Courts; and proceedings under this Act

against several persons included in one complaint shall not abate by reason of the death of any among the persons so included, but all such proceedings may be carried on as if the deceased person had not been originally so included.

SEC. 40. Appeals under this Act to be to quarter sessions.—Appeals under this Act shall be to the court of quarter sessions held next after the making of the order appealed against; but the appellant shall not be heard in support of the appeal unless within fourteen days after the making of the order appealed against he give to the local authority notice in writing stating his intention to bring such appeal, together with a statement in writing of the grounds of appeal, and shall within two days of giving such notice enter into a recognisance before some justice of the peace, with sufficient securities, conditioned to try such appeal at the said court, and to abide the order of and pay such costs as shall be awarded by the justices at such court or any adjournment thereof; and the said court, upon hearing and finally determining the matter of the appeal, may, according to its discretion, award such costs to the party appealing or appealed against as they shall think proper, and its determination in or concerning the premises shall be conclusive and binding on all persons to all intents or purposes whatsoever: provided always, that if there be no time to give such notice and enter into such recognisance as aforesaid, then such appeal may be made to, and such notice, statement, and recognisance be given and entered into for the next sessions at which the appeal can be heard; provided also, that on the hearing of the appeal no grounds of appeal shall be gone into or entertained other than those set forth in such statement as aforesaid; provided also, that in any case of appeal the court of quarter sessions may, if they think fit, state the facts specially for the determination of Her Majesty's Court of Queen's Bench, in which case it shall be lawful to remove the proceedings, by writ of *certiorari* or otherwise, into the said Court of Queen's Bench.

SOLICITORS' COSTS IN CHARITY CASES.

We have elsewhere noticed the provisions of the "Charitable Trusts' Amendment Act, 1855," to one of the sections of which as affecting in a particular manner the interests of the profession we now desire to draw attention. It is the 40th section of the Act, and its object is to take out of the hands of charities or their trustees the control over the costs of their solicitors, and this it does by enabling the board to order the bill of costs of any solicitor for business transacted by him on behalf of any charity, or the trustees thereof, to be taxed by the taxing masters

of the superior courts. So far there is not much to complain of, but the case is quite different as to the remaining provisions of the section, as they enable the board, after being satisfied that a bill contains exorbitant charges, to order the bill to be taxed, though it may have been paid by trustees within the previous six months. Now this taxation, almost as a matter of course after payment, is quite a novel provision; the Solicitors' Act provides that no bill shall be taxable after payment, unless under special circumstances, and the mere allegation of overcharges, without reference to the particular items complained of, is no ground for ordering a taxation. When these overcharges are shown to exist, the bill may be taxed if payment has not been made more than twelve months before the application (1 Chron. 303). It is true that by the above act the time is shortened, and that the board is to be "satisfied" that such bill contains "exorbitant charges," but nothing is said as to the mode in which this is to be ascertained; and the fact of exorbitant charges being made is one scarcely capable of being ascertained but by the taxation itself, or at least not by a body of non-professional persons. We give this section at length in order that our readers, whom it so nearly concerns, may clearly comprehend what it is the legislature has been pleased to enact:—

"40. *Power to refer bills of cost in charity matters to taxation.*—The board may order the bill of costs or charges claimed by any attorney or solicitor on account of business conducted or transacted by him on behalf of any charity, or the trustees thereof, to be examined and taxed by the taxing masters of the Court of Chancery, or by the proper taxing officers of any of the Superior Courts at Westminster, who shall proceed to examine and tax the same bill accordingly; and if the same shall be reduced upon such taxation by the amount of one-sixth part or more of the amount thereof, the costs of the taxation shall be paid by such attorney or solicitor, but otherwise out of the funds of the charity by the trustees thereof; and the board may, after being satisfied as to any bill that it contains exorbitant charges, order any such bill to be so taxed, notwithstanding that the same may have been paid by the trustees of the charity at any period not more than six calendar months previously to such order; and any amount taxed off any such paid bills shall be a debt due from the attorney or solicitor to the trustees of the charity, and shall be forthwith paid by him to such trustees accordingly."

POST-OFFICE MONEY ORDERS.

The following recent regulations of the General Post-office with respect to post-office money orders may be serviceable to our readers, not only for the purpose of remittances to our publisher for subscriptions, but also for their other purposes:—

"On the 1st of September and thenceforth the following regulations, in regard to the issue and payment of money orders, will come into force:—

"1. When the remitter of a money order presents a written requisition for the order, he will not be required (even when the order is not made payable through a bank) to give more than the surname and the initial of one Christian name of the payee, though he will have the option of giving the name more fully; and it will suffice if the payee's signature be as full as the name given by the remitter, and be not in any way inconsistent therewith.

"2. The payee will not be henceforth required to furnish the address of the remitter, though he will still have to give the remitter's name.

"Although it will no longer be necessary to enter the remitter's address in the advice, the remitter will still be required to furnish it, and postmasters must, as heretofore, enter it in their journal.

"ROWLAND HILL, Secretary."

DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' SOCIETY.

15th August, 1855.

"Is a husband's contract to sell his wife's term of years binding on her surviving?"

The earliest authority on the question is *Steed v. Craigh* (9 Mod. 42), where a husband, being possessed of a long term of years in right of his wife, granted an under-lease for ten years; and having, during the existence of such under-lease, borrowed money of the under-lessee, covenanted to grant him a further lease after the expiration of ten years. The husband died before the execution of the further lease, but on a bill being filed to restrain the wife from proceeding at law to recover possession, the Master of the Rolls held that it was a good disposition of the term in equity, and granted an injunction.

In *Druce v. Denison* (6 Vic. 385) the point again came under consideration, together with the further question of who was entitled to the rent, the husband's representatives or the wife.

The case was decided on other grounds. Lord Eldon observing that, if the point was untouched by decision, he thought it would be found the analogy to other cases would make out that an assignment

in equity was to that purpose as good as an assignment at law.

These cases, although relating to agreements for leases, instead of contracts for sale, have, nevertheless, a direct bearing on the question discussed at the meeting as such agreements for leases would be dispositions *pro tanto*.

It was argued in the negative that the wife has an equal equity with the purchaser, and that such being the case the law would be allowed to prevail, but on the other hand it was contended that a distinction is to be drawn between the wife's choses in action and her terms for years; that whereas the former do not vest in the husband until reduced into possession, the latter vest in him by virtue of the marriage alone, and the wife would only be entitled to such portion of them as was undisposed of at his decease; and consequently the equity of the purchaser, being prior in point of time to that of the wife, would be preferred.

It was also argued in the negative, that the tendency of modern decisions has been so much in favour of the wife, and the protection of her interests, that were the point to come before the court at the present day, the earlier authorities would probably be over-ruled.

The meeting decided in the affirmative.

A slight discussion took place as to whether the wife would be entitled to a settlement out of the unpaid purchase money.

The subject was not fully discussed, and it was admitted that no cases had been found directly bearing on it; but the meeting thought she would be entitled.

29th August, 1855.

"A., by will, devises an estate to B., charged with the payment of a sum of money in favour of C. for an illegal object, invalidating the gift *ab initio*. The will contains no residuary devise. Does the charge lapse for the benefit of the devisee, B.?"

Although several of the earlier authorities (*Arnold v. Chapman*, 1 Ves. Sen. 108, *Bland v. Wilkins*, cit. 1 Bro. C. C. 61; and *Henchman v. Attorney-General*, 2 S. and S. 498) would at the first glance appear to favour the negative they are in fact distinguishable, the sums of money in those cases being in the nature of exceptions out of the devise rather than mere charges, the difference between which is founded on common sense, was noticed as early as 1779, in *Wright v. Row*, 1 Bro. C. C. 61, and has been recognised by all the modern decisions. In *Arnold v. Chapman*, decided in 1748, a copyhold estate had been devised to the defendant, he causing to be paid to the testator's executors the sum of

£1000; and the testator gave the residue of his property, after payment of debts and legacies, to the Foundling Hospital. The assets being sufficient for payment of the debts and legacies, without having recourse to the £1000, the question arose whether that sum sank for the benefit of the specific devisee, or whether the heir was entitled to it. Lord Hardwicke decided in favour of the latter, observing that the condition was in the first place lawful (i.e., the executors might have wanted the sum for payment of debts, &c.) and that, being a devise to a stranger on condition to pay, at law the heir might have entered for breach. In *Grosvenor v. Hallum*, 1 Bro. C. C. 61, n, a message had been devised to plaintiff subject to the annual payment of £10 to a charity, and Lord Camden decided that the heir took the benefit of the lapse.

It is unnecessary to refer fully to the earlier cases in the affirmative (*Jackson v. Hurlock*, 2 Eden, 263; *Barrington v. Hereford*, 1 Bro. C. C. 62; *Wright v. Ross*, supra and *Cooke v. the Stationers' Company*, 3 M. and K. 264) as the distinction before referred to is so clearly pointed out by V. C. Wood in the judgment delivered by him in *re Cooper's Trusts*, quoted fully in a note to the report of that case on appeal to the Lords Justices (L. J. R. 1854, Ch. 25.) A testator devised certain real estate to trustees in trust, in the first place to raise either by sale or otherwise within one year after his decease the sum of £2000, one moiety of which was given to one of testator's daughters for life and then to her issue, and then as to such real estate upon trust, after raising such sum, for testator's son Philip. The will contained a residuary devise. The amount was raised, but the daughter died without issue, and V. C. Wood held that it lapsed for the benefit of the specific devisee, saying, "really the whole question is whether the £1000 is an exception out of the gift of the Bradon estate, or whether it is a charge on such estate." On appeal, the counsel for the appellant admitted that if the £1000 were to be looked upon as a charge, their case was hopeless; and Lord Justice Knight Bruce, in giving judgment, said, "The law of the court is settled, agreeably to reason and good sense, that where landed estate is given by will to one set of persons, or for the purpose of one set of limitations, but is subjected by the will to a pecuniary charge for the benefit of other interests, and those other interests given by the will do not exhaust the entire property in the money, the benefit of the charge, so far as it is not given away, sinks for the benefit of those to whom the real estate is devised, subject to the charge."

The case where the gift of the sum of money fails by reason of its being void *ab initio* would appear as between the heir or residuary devisee and the

specific devisee, to be on precisely the same footing as where the lapse takes place by reason of subsequent events.

Prior to the decision in *re Cooper's Trusts*, the question was considered by many text writers as extremely doubtful, but in the last edition of *Jarman on Wills* it is treated as settled in favor of the devisee.

Where property is directed to be sold, and £1000 paid to A., and the residue of the proceeds given to B., there may be good reason for holding, though it appears from the case of *Cooper's Trusts* to be doubtful whether it would now be so held, that on failure of the gift to A. the gift to B. would not be increased, but where the whole estate is given, charged with the payment of £1000, it would seem as of course that on a failure of the charge the estate would be entirely free.

S. BALDEN, Junr., *Pro Sec.*

RECENT STATUTES, 18 & 19 VICTORIA.

SALE OF BEER ON SUNDAYS (vol. 1, p. 136).

CAP. CXVIII.—This is an act to repeal the famous act of last session (stated vol. 1. p. 136), which gave rise to so much dissatisfaction. As the enactments of the new act are short, and are a topic of daily discourse, we give them *in extenso*, premising that the act is entitled an act to repeal the act of the 17 & 18 Vic. c. 79, for further regulating the sale of beer and other liquors on the Lord's-day, and to substitute other provisions in lieu thereof, and that it closes public-houses between three and five on Sunday afternoons (including Christmas-day and Good Friday), and at eleven o'clock in the evening of such days. It recites:—

"Whereas the act now in force for further regulating the sale of fermented and distilled liquors on the Lord's Day has been found to be attended with inconvenience to the public," and then enacts as follows:—

SEC. 1. *The 17 & 18 Vict. c. 79, repealed.*—That the act of Parliament passed in the 17 & 18 Vict. [c. 79], intituled "An Act for further regulating the Sale of beer and other Liquors on the Lord's Day," be and the same is hereby repealed.

SEC. 2. *Licensed victuallers prohibited from opening houses for sale of beer, &c. during certain hours on Sundays, &c.*—It shall not be lawful for any licensed victualler, or person licensed to sell beer by retail, to be drunk on the premises, or not to be drunk on the premises, or any person licensed or authorised to sell any fermented or distilled liquors, or any person who by reason of the freedom of the mystery or craft of vintners of the city of London, or of any

right or privilege, shall claim to be entitled to sell wine by retail, to be drunk or consumed on the premises, in any part of England or Wales, to open or keep open his house for the sale of beer, wine, spirits, or any other fermented or distilled liquor, between the hours of three and five o'clock in the afternoon, nor after eleven o'clock in the afternoon, on Sunday, or on Christmas-day, or Good Friday, or any day appointed for a public fast or thanksgiving, or before four o'clock in the morning of the day following such Sunday, Christmas-day, Good Friday, or such days of public fast or thanksgiving, except to a traveller or to a lodger therein.

SEC. 3. Houses of public resort prohibited being opened for sale of liquors during certain hours on Sundays, &c.—No person shall open any house or place of public resort for the sale of fermented or distilled liquors, or sell therein such liquors, in any part of England or Wales, between three and five o'clock in the afternoon, or after eleven o'clock in the afternoon, on Sunday or on Christmas-day, or Good Friday, or any day appointed for a public fast or thanksgiving, or before four o'clock in the morning of the day following such Sunday, Christmas-day, Good Friday, or such other days appointed as aforesaid, except to travellers.

SEC. 4. Power to constables to enter houses.—It shall be lawful for any constable at any time to enter into any house or place of public resort in England or Wales for the sale of beer, wine, spirits or other fermented or distilled liquor or liquors; and every person who shall refuse to admit or shall not admit such constable into such house or place shall be deemed guilty of an offence against this act.

SEC. 5. Penalty for offences against this act.—Every person who shall offend against this act shall be liable upon a summary conviction for the same before any justice of the peace for the county, riding, division, liberty, city, borough, or place where the offence shall be committed, to a penalty not exceeding £5 for every such offence, and every separate sale shall be deemed a separate offence.

CHARITABLE TRUSTS AMENDMENT ACT.

CAP. CXXIV.—We have before (vol. 1, p. 389) referred to this act as being in contemplation, but it appears that since we noticed the bill it has undergone some alterations. The act empowers the Crown to appoint additional inspectors; declares that the acts of the board may be authenticated by the seal of the commissioners, and the signature of the secretary or chief clerk; that entries in and extracts from the books of the board may be authenticated by the signature of the secretary, and that every document having the seal of the board shall be admissible in evidence. The powers of the

commissioners and inspectors are extended so far as to enable them to require written accounts and statements and answers to inquiries relating to any charity, or the property or income thereof, by trustees or persons acting in its administration, or in receipt or payment of its moneys; by their agents; by depositaries of any funds or moneys of the charity; by persons in the beneficial receipt of its funds, and by persons having the possession or control of any documents concerning it; and these accounts and statements may be required to be verified on oath. But it is expressly provided that this is not to empower the requisition of information from persons holding or claiming to hold, any property adversely to any charity. The board are also empowered to require any of the above parties to attend to be examined, and to produce documents relating to the charity, and to examine them on oath. But no person is to be obliged to travel more than ten miles from his place of abode for that purpose. Persons refusing answers, &c., are to be guilty of a contempt of the Court of Chancery. Powers are then given to the board, where there is a division of parishes, to apportion parochial charities not exceeding £30 per annum in value. But such apportionment is not to be made without one month's public notice given, stating what it is proposed to do, and prescribing a time within which objections to it may be made; these are to be considered by the board, and, when they have decided, a copy of their order is to be deposited in the parish affected by it, and kept for inspection at the offices of the commissioners. The secretary of the board for the time being is constituted "the Official Trustee of Charity Lands;" and by that name is to be a corporation sole, with perpetual succession, in lieu of the present title of "Treasurer of Public Charities." The Lord Chancellor is empowered to appoint official trustees of charities, to act jointly with the secretary; and they, as well as the present official trustees, are to be a corporation with perpetual succession, under the name of "Official Trustees of Charitable Funds." They are to keep a banking account at the Bank of England: To them private trustees of charities may, on order of the board, transfer any stock or pay any money. All principal moneys, dividends and interest, are to be paid to their account. Copies of orders made by any court or judge for transfer, payment, &c., are to be transmitted to the board. Dividends on stock in their name are to be carried to their account free from income-tax. The 29th section prohibits trustees and persons administering any charity to sell, mortgage, or charge the charity estate, or make any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration, wholly or in

part, of any fine, or for any term exceeding twenty-one years, without the order of a court of competent jurisdiction, or without the approval of the board. When any mortgage of a charity estate is authorised by the board, provisions are to be made for directing the discharge of the principal by yearly or other instalments within thirty years from the date of the security, or to form an accumulation fund for discharging the debt within the same period. The board is empowered to authorise a compromise or adjustment of claims, or causes of suits and payments for equality of exchange or partition, and to ascertain what particular lands are charged with rents to charities. The trustees of charities, with consent of the board, may re-invest in land moneys arising from the sale of any lands. Then follow many minor provisions which have been found wanting to enable the board to perform its functions; such as powers to direct official trustees to convey lands; to approve schemes for letting charity estates; to refer bills of costs in charity matters to taxation; for enrolment of deeds relating to charities at the office, and making copies of them evidence, and to make orders as to delivery and publication of accounts by trustees of charities. Sec. 44 makes new and extended provision for the annual returns to be required of trustees of charities. By sec. 47, the act is not to apply to Roman Catholic charities until Sept. 1, 1856. This is designed to give time for the passing of a special act next session in relation to them. The 48th section defines the word "charity" to include "every institution in England and Wales endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the act of 1853." And the act is not to extend to Eton and Winchester.

MERCHANT SHIPPING AMENDMENT ACT.

CAP. XCL. This act makes provision with respect to, 1st, Colonial Lighthouses; 2nd, Registry of Ships; 3rd, Masters and Seamen; 4th, Wrecks, Casualties, and Salvage; 5th, Legal Procedure; 6th, Miscellaneous. The only provisions which it is necessary to notice here are the following: that shares in shipping are to be "stock" within the Trustee Act (sec. 10); that a registrar need not receive any bill of sale, &c., not in proper form (sec. 11); as to the delivery of certificate of registry on transfer (sec. 12); and to registry books in London being evidence (sec. 15); and as to jurisdiction in cases of offences on board of ship (sec. 21). The following are the sections containing such provisions:—

SEC. 10. *Shares in Shipping within the Trustee Act, 1850, 13. & 14 Vic. c. 60.*—Shares in ships

registered under the said Merchant Shipping Act, 1854, shall be deemed to be included in the word "stock," as defined by the Trustee Act, 1850, and the provisions of such last-mentioned act shall be applicable to such shares accordingly.

SEC. 11. *Forms of instruments, 17 & 18 Vic. c. 104, s. 96.*—In any case in which any bill of sale, mortgage, or other instrument for the disposal or transfer of any ship, or any share or shares therein, or of any interest therein, is made in any form or contains any particulars other than the form and particulars prescribed and approved for the purpose by or in pursuance of the Merchant Shipping Act, 1854, no registrar shall be required to record the same without the express direction of the Commissioners of Her Majesty's Customs.

SEC. 12. *Delivery of certificate upon transfer of registry, 17 & 18 Vic. c. 104, s. 90.*—Upon the transfer of the registry of a ship from one port to another, the certificate of registry required by the 90th section of the Merchant Shipping Act, 1854, to be delivered up for that purpose, may be delivered up to the registrar of either of such ports.

SEC. 15. *General Register Books in London, 17 & 18 Vic. c. 104, s. 107.*—The copy or transcript of the register of any British ship which is kept by the chief registrar of shipping at the Custom-house in London, or by the registrar-general of seamen, under the direction of Her Majesty's Commissioners of Customs or of the Board of Trade, shall have the same effect, to all intents and purposes, as the original register of which the same is a copy or transcript.

SEC. 21. *Jurisdiction in case of offences on board ship, 12 & 13 Vic. c. 96.*—If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour, or if any person not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions which would have had cognisance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits: provided, that nothing contained in this section shall be construed to alter or interfere with the act of the 12 & 13 Vic. c. 96.

CAP. XC.—*Costs in Crown suits.*—This act provides for the payment of costs in proceedings instituted on behalf of the Crown in matters relating to the revenue, and for the amendment of the procedure and practice in Crown suits in the Court of Exchequer. The object is to assimilate the law as to

the recovery of costs in such proceedings by or on behalf of the Crown to that existing as to proceedings between subject and subject. To effect this it is provided, sec. 1, that in all Crown suits where the Crown is successful costs are to be recovered as between subject and subject. By sec. 2, in such suits, a successful defendant is to be entitled to costs. The 3rd sec. recites that the procedure in the Court of Exchequer in Crown suits is dilatory, and it therefore empowers the judges to make rules and orders for the regulation of the pleading and practice in Crown suits, which rules and orders are to be laid before Parliament, and are not to come into operation for three months thereafter. Omitting this last section, the following are the provisions of the act, with its preamble :—

Whereas in divers proceedings instituted by or on behalf of the Crown against the Queen's subjects in respect of matters relating to the revenue no costs are recovered by the Crown, except in certain cases, and no costs are paid by the Crown to the subject : and whereas it is expedient to assimilate the law as to the recovery of costs in such proceedings by or on behalf of the Crown to that in force as to proceedings between subject and subject ; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. *In all Crown suits, &c., where the Crown is successful, costs to be recovered as between subject and subject.*—In all informations, actions, suits, and other legal proceedings to be hereafter instituted before any court or tribunal whatever in the United Kingdom of Great Britain and Ireland, by or on behalf of the Crown, against any corporation, or person or persons, in respect of any lands, tenements, or hereditaments, or of any goods or chattels, belonging or accruing to the Crown, the proceeds whereof, or the rents or proceeds of which said lands, tenements, or hereditaments, by any act now in force or hereafter to be passed are to be carried to the consolidated fund of Great Britain and Ireland, or in respect of any sum or sums of money due and owing to Her Majesty by virtue of any vote of Parliament for the service of the Crown, or of any act of Parliament relating to the public revenue, Her Majesty's Attorney-General, or in Scotland the Lord Advocate, shall be entitled to recover costs for and on behalf of Her Majesty, where judgment shall be given for the Crown, in the same manner, and under the same rules, regulations and provisions, as are or may be in force touching the payment or receipt of costs in proceedings between subject and subject, and such costs shall be paid into the

exchequer, and shall become part of the consolidated fund.

2. *Defendant entitled to costs, if successful against the Crown.*—If in any such information, action, suit, or other proceeding, judgment shall be given against the Crown, the defendant or defendants shall be entitled to recover costs, in like manner, and subject to the same rules and provisions, as though such proceeding had been had between subject and subject ; and it shall be lawful for the Commissioners of Her Majesty's Treasury, and they are hereby required to pay such costs out of any moneys which may be hereafter voted by Parliament for that purpose.

CXL. *Bills of Lading.*—This is an act to remedy two inconveniences which have been felt among commercial men as to bills of lading,—first, that the contract did not, as we have elsewhere pointed out, pass by the indorsement of a bill of lading, whilst the property in the goods did (Key, div. Common Law, pp. 31, 32, 3rd edit. ; *Thompson v. Doming or Downing*, 14 Mees. & W. 403 ; S. C. 14 Law Journ. Exch. 340). Secondly, that the master of a ship giving a bill of lading of goods which have never been shipped cannot be considered as the agent of the owner so as to render the latter responsible to one who has made advances on the faith of the bills so signed (*Hubbersty v. Ward*, 8 Exch. Rep. 380). The intent of the above act is to remedy both the above cases. As to the first it recites that by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property ; and then enacts, that every consignee of goods named in a bill of lading, and every indorsee thereof, to whom the property passes by the consignment or indorsement, shall also have transferred to him *all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.* This provision, however, is not to affect the right of stoppage in transitu, or of claiming freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason of such consignment or indorsement. As to the second branch of the subjects, the statute appears rather to confirm, with some modification, the doctrine already established, than to introduce any material alteration in the law. After reciting that “it frequently happens that the goods, in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading, in the hands of a

bond fide holder for value, should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden," it is enacted by the 3rd section that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be *conclusive evidence* of such shipment as against the master or other person signing the same, unless the holder of the bill of lading had *actual notice*, at the time of receiving it, that they had not been shipped. The person signing the bill of lading, however, may exonerate himself by shewing that the misrepresentation was caused *without any default on his part, and wholly by the fraud of the shipper or holder, or some person under whom the holder claims.*

The following are the enactments *in extenso* :—

SEC. 1. *Rights under bills of lading to vest in consignee or indorsee.*—Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. *Not to affect right of stoppage in transitu, or claims for freight.*—Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

3. *Bill of lading in hands of consignee, &c., conclusive evidence of the shipment as against master, &c. Proviso.*—Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

SUMMARY JURISDICTION AT PETTY SESSIONS.

CAP. CXXVI.—This is an act entitled "An act for diminishing the expense and delay in the administration of criminal justice in certain cases," which may be stated to be attempted to be accomplished by giving justices in Petty Sessions a summary jurisdiction to try, by the consent of the prisoner, charges of *larceny*, where the value of the property stolen does not exceed *five shillings*, and attempts to commit larceny, and, as we shall presently see, there is an enlarged jurisdiction in cases of simple larceny of goods above the value of five shillings, or stealing from the person or larceny as a servant or clerk, but this is only in the event of the *accused pleading guilty*. The jurisdiction conferred by the act may be thus stated. Magistrates in petty sessions are empowered, by consent of the prisoner, to adjudicate summarily upon charges of *simple larceny*, if the value of the whole of the property alleged to have been stolen does not in their judgment exceed five shillings, and upon charges of *attempts to commit larceny from the person, or simple larceny*. If they find the offence proved, they may commit the offender to the common gaol or house of correction, to be imprisoned, with or without hard labour, for any period not exceeding *three calendar months*; and if they find the offence not proved, they are to dismiss the charge, and deliver to the person charged a certificate of such dismissal. There are three cases, however, in which this summary jurisdiction is not to be exercised by the justices. First, if the person charged do not consent thereto; and for the purpose of ascertaining whether he consents, one of the justices, after the examination of all the witnesses for the prosecution, and before calling on the party charged for any statement, is to state to him the substance of the charge, and to say to him, "Do you consent that the charge against you shall be tried by us, or do you desire that it shall be sent for trial by a jury at the sessions," [or "assizes," as the case may be]; and if he consent, the charge is to be reduced into writing, and read to him; and he is then to be asked whether he is guilty or not of such charge; and if he says that he is not guilty, he is to be asked whether he has any defence to make to such charge; and if he state that he has, his defence is to be heard. Secondly, if it appear to the justices that the offence is one which, owing to a previous conviction, is punishable by law with transportation or penal servitude; and, thirdly, if they are of opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment.

In any of the above three cases the justices are to deal with the charge in all respects as if the act had not been passed. It is further provided, that if

upon the hearing of the charge they shall be of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, they may dismiss the person charged without proceeding to a conviction.

It will be seen that a distinction is made between charges involving the actual commission of a larceny and those which relate only to *attempts* to commit it; in the former case the offence must be simple larceny, and the value of all the articles stolen must not in the judgment of the justices exceed five shillings; but they may decide in a summary manner a charge of an attempt to commit not only simple larceny, but larceny from the person, and this whatever may be the value of the article attempted to be stolen.

The enlarged jurisdiction above stated to be conferred upon magistrates in cases where the accused pleads guilty to the charge, is given by sec. 3 of the act, which provides that, if a person is charged with *simple larceny (the value of the property exceeding five shillings), or stealing from the person, or larceny as a clerk or servant*, and the evidence on the part of the prosecution appears to the justices sufficient to put the accused on his trial, and they think that the case may be properly disposed of in a summary manner, they are to reduce the charge into writing and read it to the accused, and explain to him that he is not obliged to plead or answer before them at all, and that if he do not do so he will be committed for trial in the usual course, and then to ask him whether he is guilty or not; and if he says that he is guilty, they are to cause the plea of guilty to be entered on the proceedings, and to convict him, and to commit him to prison, with or without hard labour, for any term not exceeding *six calendar months*.

The following are the other provisions of the act: In every case of summary proceeding the accused is to be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney: (sec. 4).

Where a person is charged before any justice or justices with any offence mentioned in this act, and in the opinion of such justice or justices the case is a proper one to be disposed of under this act, the accused may be remanded for further examination to the next Petty Sessions (sec. 5).

Forfeited recognizances are to be transmitted to the clerk of the peace. Convictions and other proceedings under the act are to be returned to the Quarter Sessions (secs. 6, 7).

Justices may order restitution of the stolen property (sec. 8).

A conviction under this act is to have the same effect as a conviction upon indictment, except that

it is not to be attended with any forfeiture: (sec. 11).

A certificate of dismissal is to be a bar to further criminal proceedings for the same cause: (sec. 12).

No conviction is to be quashed for want of form: (sec. 13).

Justices are empowered to order payment to the prosecutor or witnesses of such compensation for 'expenses, trouble and loss of time' as to them may seem reasonable; and to the certificate may be added the fees of court, and the expenses of apprehending and keeping in custody the person charged, and all other expenses now by law payable when incurred before a commitment for trial: (sec. 14).

The town hall, court-house, &c., of any county, city, or borough, may be used for petty sessions held under the present act (sec. 15).

Any metropolitan police magistrate or stipendiary magistrate in the country may act alone for the purpose of this act (sec. 16). It is not to affect the juvenile offenders act (sec. 17).

Clerks of the peace, and other officers of the courts of Quarter Sessions are to be compensated for any loss of fees by reason of this act, by comparison, on an average of five years immediately preceding the passing of the act, with any year after this act, to be awarded by the treasury (sec. 18).

Power is given to increase the salary of the chief magistrate of the police courts of the metropolis to £1,500 (sec. 19).

Clerks of assize and their associates are to be paid wholly by salary instead of fees, the salary to be appointed by the treasury (sec. 20).

The 22nd section travels out of the immediate object of the act, to make a desirable amendment in the law. It provides that, in charges before justices of wilful and malicious injuries to property, the parties aggrieved may receive compensation, although examined as witnesses in proof of the offence.

The following clauses of the act are given in full as being of most importance:—

SEC. 1. *Power to justices at Petty Sessions 'to punish persons charged with larceny, &c., summarily; if parties accused do not consent, justices to deal with cases as if this act had not passed.*—Where any person is charged before any justices of the peace assembled at such petty sessions as hereinafter provided with having committed simple larceny, and the value of the whole of the property alleged to have been stolen does not, in the judgment of such justices, exceed five shillings, or with having attempted to commit larceny from the person, or simple larceny, it shall be lawful for such justices to hear and determine the charge in a summary way; and if the person charged shall confess the

same, or if such justices, after hearing the whole case for the prosecution and for the defence, shall find the charge to be proved, then it shall be lawful for such justices to convict the person charged, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any period not exceeding three calendar months; and if they find the offence not proved they shall dismiss the charge, and make out and deliver to the person charged a certificate under their hands, stating the fact of such dismissal; and every such conviction and certificate respectively may be in the forms (A.) and (B.) in the schedule to this act, or to the like effect: provided always, that if the person charged do not consent to have the case heard and determined by such justices, or if it appear to such justices that the offence is one which, owing to a previous conviction of the person charged, is punishable by law with transportation or penal servitude, or if such justices be of opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment, rather than to be disposed of summarily, such justices shall, instead of summarily adjudicating thereon, deal with the case in all respects as if this act had not been passed: provided also, that if upon the hearing of the charge such justices shall be of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the person charged, without proceeding to a conviction.

SEC. 2. Justices to ask the accused whether he consents to the charge being summarily determined.—Where the justices before whom any person is charged as aforesaid propose to dispose of the case summarily under the foregoing provisions, one of such justices, after the examination of all the witnesses for the prosecution have been completed, and before calling upon the person charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, and shall then say to him these words, or words to the like effect: 'Do you consent that the charge against you shall be tried by us, or do you desire that it shall be sent for trial by a jury: at the sessions or assizes' (as the case may be); and if the person charged shall consent to the charge being summarily tried and determined as aforesaid, then the justices shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge; and if such person shall say that he is guilty, the justices shall then proceed to pass such sentence upon him as may by law be passed, subject to the provisions of this act in respect to such offence; but if the person charged shall say that he is not guilty,

the justices shall then inquire of such person whether he has any defence to make to such charge, and if he shall state that he has a defence the justices shall hear such defence, and then proceed to dispose of the case summarily.

SEC. 3. Persons charged with larceny, &c., may plead guilty before justices in petty sessions, and be sentenced forthwith; justices to warn the accused that he is not obliged to plead.—Where any person is charged before any justices at such petty sessions as aforesaid with simple larceny (the property alleged to have been stolen exceeding in value five shillings), or stealing from the person, or larceny as a clerk or servant, and the evidence, when the case on the part of the prosecution has been completed, is in the opinion of such justices sufficient to put the person charged on his trial for the offence with which he is charged, such justices, if the case appear to them to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this act, shall reduce the charge into writing, and shall read it to the said person, and shall then ask him whether he is guilty or not of the charge; and if such person shall say that he is guilty such justices shall thereupon cause a plea of guilty to be entered upon the proceedings, and shall convict him of such offence, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding six calendar months; and every such conviction may be in the form (C.) in the schedule to this act, or to the like effect: provided always, that the said justices, before they ask such person whether he is guilty or not, shall explain to him that he is not obliged to plead or answer before them at all, and that if he do not plead or answer before them he will be committed for trial in the usual course.

SEC. 4. Persons accused may have assistance of counsel, &c.—In every case of summary proceeding under this act the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

SEC. 5. Power to remand persons charged to next petty sessions.—Where any person is charged before any justice or justices with any offence mentioned in this act, and in the opinion of such justice or justices the case may be proper to be disposed of by justices in petty sessions under this act, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for further examination to the next petty sessions, in like manner in all respects as a justice or justices are authorised to remand a party accused under the act passed in the session holden in the

eleventh and twelfth years of her Majesty, chapter forty-two, section twenty-one, or under the petty sessions act (Ireland) 1851, section fourteen.

SEC. 14. *Justices may order payment of expenses.*—Where any charge is summarily adjudicated upon under this act, or an offender is under this act convicted by justices in petty sessions upon a plea of "guilty," it shall be lawful for the justices by whom such charge has been adjudicated upon or offender convicted, upon the request of any person who has preferred the charge or appeared to prosecute or give evidence against the person charged, if such justices think fit so to do, to grant a certificate to such person of the amount of the compensation which such justices may deem reasonable for his expenses, trouble and loss of time therein, subject nevertheless to the regulations made or to be made as hereinafter mentioned; and every such certificate shall, when granted in England, have the effect of an order of court for the payment of the expenses of a prosecution made under the act of the seventh year of King George the Fourth, chapter sixty-four, and the acts amending the same, and when granted in Ireland shall have the effect of an order of court for the payment of the expenses of a prosecution made under the act of the fifty-fifth year of King George the Third, chapter ninety-one, and the acts amending the same; and the amount mentioned in such certificate shall be paid in like manner as the money mentioned in such order of court; and all certificates to be granted under this act shall be subject to the like regulations made or to be made in relation thereto as the certificates mentioned in the said act of the seventh year of King George the Fourth to be granted by examining magistrates are or may be subject to under the act of the session holden in the fourteenth and fifteenth years of her Majesty, chapter fifty-five: provided also, that the amount of the fees payable to the clerks of the magistrates in petty session, in respect of any proceeding under this act, and of the fees payable to the clerks of the peace for filing the depositions, conviction, or certificate of dismissal aforesaid, and of all such expenses of apprehending the person charged, and detaining him in custody, and of such other expenses as are now by law payable when incurred before a commitment for trial, may be added to the certificate for compensation aforesaid, and paid in the like manner.

SEC. 16. *Any metropolitan police magistrate or stipendiary magistrate may act alone.*—Any one of the magistrates appointed to act at any of the police courts of the metropolis, and sitting at a police court within the metropolitan police district, or any magistrate appointed to act at the police courts of the Dublin metropolitan district, and sitting at a

police court within the said district, or any stipendiary magistrate appointed for any city, town, liberty, borough or district, and sitting at a police court, or other place appointed in that behalf, may, in the case of persons charged before such magistrate, do alone all acts by this act authorised to be done by justices of the peace in petty sessions, and all the provisions of this act referring to justices in petty sessions shall be read and construed as referring also to such magistrate.

SEC. 17. *Nothing to affect provisions of 10 & 11 Vict. c. 82, and 13 & 14 Vict. c. 37.*—Nothing in this act shall affect the provisions of the act of the session holden in the tenth and eleventh years of her Majesty, chapter eighty-two, 'For the more speedy trial and punishment of juvenile offenders,' or of the act of the session holden in the thirteenth and fourteenth years of her Majesty, chapter thirty-seven, 'For the further extension of summary jurisdiction in cases of larceny,' or of the summary jurisdiction (Ireland) act 1851; and this act shall not extend to persons punishable under the said acts, so far as regards offences for which such persons may be punished thereunder.

SEC. 22. *In cases of injuries to property, parties aggrieved may receive compensation, though examined as witnesses.*—And whereas it is expedient to amend the law as to witnesses in cases of wilful or malicious injuries to property: be it further enacted, that in all cases where any justice or justices of the peace have or shall hereafter have power to order a sum of money to be forfeited and paid to the party aggrieved, as amends or compensation for any injury to property, real or personal, the right of such party to receive the money so ordered to be paid shall not be affected by such party having been examined as a witness in proof of the offence, any law or statute to the contrary notwithstanding.

EDUCATION OF POOR CHILDREN.

CAP. XXXIV. This is an act to provide for the education of children of persons in the receipt of out-door relief. By sec. 1, the guardians of any union or any parish may grant relief for the purpose of enabling any poor person lawfully relieved out of the workhouse to provide education for any child of such person between the ages of 4 and 16, in any school to be approved of by the said guardians. By sec. 5, the same may be done in the case of any child of any such age relieved as aforesaid, having been deserted by its parents or surviving parent, or both of whose parents are dead.

REFORMATION OF JUVENILE OFFENDERS.

CAP. LXXXVII. This act, so far as concerns England, is one to amend the 17 & 18 Vic. c. 86

(stated vol. 1, p. 236) for the better care and reformation of youthful offenders. It repeals (sec. 1) the 5 & 6 secs. of the 17 & 18 Vic. c. 86, and then (sec. 2) makes provision for enforcing contribution to an amount not exceeding 5s. per week by parents to the maintenance of juvenile offenders in reformatory schools; and sec. 8 provides for the recovery of the sums ordered to be paid.

METHYLATED SPIRITS.

CAP. XXXVIII. This is an act to allow spirits of wine to be used duty free in the arts and manufactures. By sec. 1, a mixture of spirit of wine and methylic alcohol (which by sec. 2 is to be termed methylated spirit) may be allowed duty free for use in the arts or manufactures, but by sec. 3, persons (other than distillers or rectifiers) authorised to make methylated spirits are to pay for a license for that purpose and by sec. 4, the places of mixing are to be approved and entered.

BURIAL ACTS (vol. 1. p. 236).

There have been two acts in the last session relating to Burials; the first and most important is cap. cxxviii., and it recites the 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134, and 17 & 18 Vict. c. 87 (the last stated vol. 2. p. 286), and that it is expedient that further provision should be made for the burial of the dead, and that the said acts should be amended. The following are the principal enactments of this act: it empowers the Privy Council to vary their existing orders by other orders, and inflicts a penalty of £10 on persons burying contrary to those orders (ss. 1 & 2); churchwardens are empowered of their own accord to call a vestry meeting to determine if a burial-ground shall be provided, and where an order in council has been made or notice given to apply to the Privy Council to close a burial-ground, the churchwardens are required to convene a vestry and to proceed as directed by the former statute (s. 3).

Vacancies in burial boards are to be filled up by the vestry within a month (s. 4). The requirement in sec. 13 of the 15 & 16 Vict. c. 85, that burial boards shall meet monthly is repealed (s. 5). If the vestry refuse or neglect to authorise the expenditure of moneys necessary to be laid out by the burial board for the providing or laying out burial-grounds, or building the necessary chapel, the board may certify same to the Secretary of State, who is empowered to authorise such expenditure in lieu of the vestry: (sect. 6). Fees and payments for burials are to be approved by the Secretary of State, who is also empowered to order inspection of burial grounds to ascertain that they are properly conducted (s. 7, 8). Sec. 9, a part of sec. 24 of 15 & 16 Vic. c.

85, repeals the prohibition of a burial-ground, being made within 200 yards of a dwelling-house without the owner's consent, and substitutes a limit of 100 yards. If the ratepayers so resolve, the land for the new burial-ground may be conveyed and settled as the old burial-ground or churchyard (s. 10). Directions are by sec. 11 given for the manner of providing a burial ground for united parishes. Sect. 12 empowers the formation of burial boards for any parish, &c. (not separately maintaining its own poor) which had a separate burying-ground, the expenses of which are to be paid by a separate rate upon such parish, &c. (sec. 13) provides for the expenses of burial boards of places not separately maintaining their own poor. It is enacted by sec. 14 that there shall be no obligation to build a chapel for persons not members of the Church of England if the Secretary of State, on the representation of three fourths of the vestry, should declare it to be unnecessary. Land purchased for burial grounds is not to be assessed at any higher rate than before it was purchased or resold for such purpose (s. 15). Where burial-grounds adjoin, separate boards are empowered to contract with each other for the erection of a chapel for the common use (s. 16). The board may let any portion of the land not required for burial, and it is required to keep in order the closed burial-grounds (s. 17). By sec. 20 local boards of health may exercise all the powers of the Burial Acts. The other act above referred to is the 18 & 19 Vict. c. 79, amending the law regarding the burial of poor persons by guardians and overseers of the poor. It enacts that where the burial-grounds of a parish are closed or overcrowded, the guardians &c., may bury in the neighbouring parish, or may enter into agreements with cemetery companies or burial boards for that purpose.

Instead of setting out in full the enactments of the above acts, we think the following summary account of the statutes now in existence, relative to burials in England and Wales will be more acceptable to our readers, and may be relied on, the same having been promulgated by authority:—

Her Majesty in Council, on the representation of the Secretary of State (certain forms having been complied with), may order the discontinuance of burials in any burial-ground in England and Wales, except such cemeteries as may have been established under special authority of Parliament. Any order in Council may be amended or repealed by any subsequent order. Any person assisting at any burial in violation of such order is guilty of a misdemeanour and liable to a penalty of £10. License may be granted, under certain circumstances, by the Secretary of State for the continued use of private vaults and graves. No new burial-ground

can be opened in any district wherein any order in Council has been made without the previous approval of the Secretary of State; but, after approval and opening, such new grounds cannot be closed in future.

The churchwardens of any parish are empowered—and if any order in Council has been made, or notice given, they are required—to call a meeting of the vestry to determine whether a new burial-ground shall be provided for the parish. And if the vestry shall resolve that a burial-ground shall be provided, a copy of such resolution must be sent to the Secretary of State; and they shall appoint a burial board for that purpose, consisting of not less than three and not more than nine persons, the incumbent to be eligible, though not a ratepayer. Vestries of two or more parishes may combine to appoint one joint burial board for such parishes. Burial boards may be appointed for united parishes, or for townships having separate burial-grounds, or for places being parts of parishes.

Town councils in boroughs may, on petition to the Queen in Council, become the burial boards for their respective boroughs; and like powers may be exercised (without such petition) by local boards of health. Vacancies in the burial board may be filled up. The city Commissioners of Sewers are constituted the burial board for the city of London.

Burial boards may appoint clerks, officers, and servants at reasonable salaries, approved by the vestry. They are to keep minutes of their proceedings and accounts open to inspection, and allow copies to be taken, under penalty for refusal not exceeding £5. The accounts are to be audited annually by persons appointed by the vestry. Any expenses beyond receipts, on approval of the vestry, unless dispensed with by the Secretary of State, will be defrayed out of the poor-rates. Money may be borrowed on the security of the poor-rates, one-twentieth of the principal to be repaid annually, besides the interest. The Public Works Loan Commissioners are authorised to advance money for the purposes of these acts. Money may be borrowed at lower rates of interest, and to pay off former mortgages. Any surplus above expenses is to be paid over in aid of the poor-rate.

The burial board, when constituted, shall proceed to provide a new burial-ground, either within or without the parish. No burial-ground under these acts can be opened within 100 yards of any dwelling-house without the consent in writing of the owner, the lessee, and occupier of such dwelling-house. Part of such new burial-ground to be consecrated and part unconsecrated; but on the unanimous resolution of the vestry any new burial-ground may be conveyed and settled in like manner as the old

burial-ground or churchyard, the whole to be consecrated; and if it shall afterwards be found that accommodation is required for Dissenters, an unconsecrated ground may be provided separately.

Burial boards may purchase land for a burial-ground and re-convey or let lands not wanted; and may appropriate, with approval of vestry, parish lands.

The burial board may lay out grounds to the satisfaction of the bishop previous to consecration, and chapels may be built. Division of the ground into consecrated and unconsecrated portions, and the plans for chapels, to be approved by the Secretary of State. The expenditure to be approved by the vestry, or in default by the Secretary of State. Burial boards having burial-grounds adjoining may contract with each other for use of chapels in common. They may enter into contracts for work under certain conditions.

The new burial-ground when provided shall be the burial-ground of the parish, in which all parties shall have the same rights as in the old ground. Burial boards may sell rights of burial in vaults, and to erect monuments, &c., reserving such fees to the incumbent, in lieu of fees to which he would be entitled in the burial-ground of his parish, as shall be fixed by the vestry, with the approval of the bishop, or as he would have been entitled to by law should no such settlement be made. Burial boards shall fix such other fees for interment, &c., as may be approved by the Secretary of State. Churchwardens' rights are reserved. Vestries may, with the approval of the bishop, revise the fees payable to incumbent, clerks, and sextons, or substitute fixed annual payments. General management of the burial-ground is vested in the burial board. Arrangements between incumbents of two or more parishes may be made and confirmed by the bishop. Compensation fee to incumbents for pauper burial in cemeteries is not to exceed 1s., or the sum received in his parish ground, and in no case to exceed 2s. 6d.; and the same limit shall apply to burials at the expense of hospitals. Incumbents' compensation fees payable to churchwardens previously entitled to receive the same.

Registers are to be duly kept, entries in which are to be evidence. Searches may be made and extracts taken.

Land purchased and used for a new burial-ground shall not be assessed to any rate at a higher value than that at which it was assessed prior to such purchase. Persons committing any wilful damage or nuisance in the burial-grounds provided by virtue of these acts are liable to a penalty of £5.

Burial boards may make arrangements for the conveyance of bodies for interment, and they, or

the churchwardens and overseers, where no board has been appointed, may provide reception houses for the dead.

When the burial-ground of any parish is closed or overcrowded poor persons may, at the discretion of the guardians or overseers, be buried in some neighbouring parish. (This power is given under the 5th act, c. 79.)

The Secretary of State may direct inspection of and make regulations to be observed in any burial-ground, parochial or non-parochial, provided under these acts, any breach of which will render the offender liable to a penalty of £10.

Incumbent and churchwardens of any parish having a chapel not locally situate in the parish, the burial-ground of which chapel shall have been closed, may convey such chapel to new trustees.

Burial boards or churchwardens are to keep in decent order parish burial-grounds which have been closed, and repair the walls and fences thereof.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

BURIAL BOARD.—*Purchase of lands by—Annual sum—Perpetual charge.*—A burial board, duly constituted under the 15 & 16 Vic. c. 85, and the 16 & 17 Vic. c. 134, agree to purchase parish lands on the terms of paying an annual sum, the principal to be secured either on the land or as a charge on the church-rate or poor-rate. On petition to carry out this agreement: Held, that the money must be paid into court in a gross sum, the dividends to be paid to the vendors until invested in land, and the costs to be paid by the burial board. *Semble*, the court will not sanction a perpetual charge. *In re Barrow, and in the matter of the 15 & 16 Vic. c. 85, 16 & 17 Vic. c. 134, The Charitable Trusts Act of 1853, and the Lands Clauses Consolidation Act.* Week. Rep. 1854-5, p. 635.

DESTROYED BILL OR NOTE.—*No relief in equity—Distinction between lost and destroyed bill or note.*—The following case recognises the distinction between a lost and a destroyed bill or note, as to relief being granted in equity. It was long ago established that where a bill has been proved to have been destroyed the holder might recover its amount at law (*Woodford v. Whiteby*, Mood. and M. 517; Chit. Bills, 268, citing *Pierson v. Hutchinson*, 2 Campb. 212). And, as we have seen (vol. 1, p. 162), in an action on a bill or note, the court of common law may order that the loss shall not be set up, provided an indemnity be given. Although a court of equity will assume jurisdiction in the case of a lost bill of exchange upon which the acceptor cannot be sued at law, it will not so to give relief upon

such an instrument proved to have been destroyed, and upon which a remedy is open to the plaintiff by action at law. A bill was filed by the indorsee of a bill of exchange, praying a declaration that the defendant was liable to pay the plaintiff the amount, and a decree for payment, the plaintiff offering to indemnify the defendant against all claims in respect of it. The bill alleged that the bill had been destroyed, and a forged bill substituted. The defendant filed a general demurrer, and the same was allowed. *Wright v. Maidstone*, Week. Rep. 1854-5, p. 618; 25 Law Tim. Rep. 287.

WATER.—*Grant of in conveyance—By pipe of certain size.*—A conveyed to B. in fee a parcel of land lying about twenty yards from a stream, the soil and both banks of which belonged to A., "with liberty to B. to take water from the said stream for the use of his mill by a pipe not exceeding twelve inches in diameter." Held, by the Lords, that B. had no right to dam up the bed of the stream so as to force the water up into the pipe, thereby making it always run to the full. *Walker v. Stewart*, 25 Law Tim. Rep. 285.

COMMON LAW PRACTICE.

ARBITRATION.—*Rescinding submission—Misconduct of arbitrator—Examining witnesses without knowledge of one of the parties—Waiver of irregularity.*—In England either party to a reference may apply to the court or a judge to rescind the submission for proper cause; but in Scotland there is no such mode in which the parties can stop a pending arbitration. Where an arbitrator, to whom certain disputed debts between A. and B. had been referred, was one of several trustees who had lent part of the trust monies to A. unknown to B., who, on discovering the fact, and that A. was insolvent, applied to the court of session in Scotland to rescind the submission, but the application was refused. On appeal to the Lords, it was held the interest in the arbitrator was too remote to warrant the court in rescinding. Where an arbitrator examines witnesses behind the back of one of the parties, such party is justified in at once abandoning the reference, and applying to a judge to rescind the submission, but if he continue, after the fact has come to his knowledge, to attend the subsequent proceedings, this will be a waiver of the irregularity, and he cannot afterwards set aside the award on that ground. *Drew v. Drew*, 25 Law Tim. Rep. 282.

ARBITRATION.—*Part decided by arbitrators and part by umpire—Enlargement of time by umpire alone.*—In ordinary cases of submission to arbitration, the parties submit all matters in difference to two arbitrators, one generally named by each party, and, in case of their differing, to an umpire, who is

either fixed on by the parties themselves, or chosen by the arbitrators; in this case all the arbitrators have to do is to hear the parties and their witnesses, and, if they agree, to make an award; but, if they cannot agree, they should state their disagreement, and then refer the *whole* question to the umpire. If they should take upon themselves to decide half of the matter, and refer the other half to the decision of the umpire, that would be bad. But as a submission to arbitration is but a contract between the parties, they may vary the terms of it, and stipulate that the arbitrators shall decide all matters that they can agree upon, and that if there be anything upon which they cannot come to an unanimous decision, and cannot concur in their award, the matter upon which they do not concur shall be left to the settlement of an umpire. And further, that the arbitrators may, from time to time as they differ, refer each subject to the umpire, retaining concurrently their jurisdiction over each subject. If the parties intend so to deviate from the ordinary course, they should clearly express their intention, as shown by the following decision of the Lords on an appeal from the court of session in Scotland. A deed of submission was entered into to A. and B., and in the event of their differing, to any umpire they might appoint, and the parties agreed to submit to "whatever the arbitrators or umpire should determine by an award or awards interim or final," and gave powers to them to enlarge the time. Within the last enlargement of time made by A. and B. they delivered no award, but having agreed upon all the matters except two, they appointed C. as umpire in and concerning those two matters, and to that extent devolved upon him all the powers competent to an umpire. C. then enlarged the time for making the award generally, and within that time, but after the expiring of the last enlargement made by themselves, A. and B. delivered their award regarding those matters which they had not referred to the umpire: Held, reversing the decision of the court of session, that the award of the arbitrators was not within the proper time, for that the enlargement made by the umpire was not applicable to their award, being beyond his powers as regarded them. *Lang v. Brown*, 25 Law Tim. Rep. 297.

COUNTY COURTS.

JUDGMENT, ENFORCING.—*In equity.*—A most important decision has been given by V. C. Kindersley, to the effect that a court of equity will aid a creditor who has obtained judgment in a county court, and issued execution thereon without any result, in realising his debt and costs out of the equitable assets of his debtor—as where the debtor is entitled to an annuity payable out of leaseholds

vested in trustees. *Bennett v. Powell*, 25 Law Tim. Rep. 281.

BANKRUPTCY AND INSOLVENCY.

ARRANGEMENTS.—*Bankrupt Consolidation Act, ss. 79, 81, 211*—*Petition for arrangement after filing—Admission of demand of creditor's debt.*—The Court of Appeal in Chancery have held that where a trader has signed and filed an admission of a demand against him under the 79th and 81st secs. of the Bankruptcy Consolidation Act (set out vol. 1, pp. 229, 251, 255) it is not competent for him to petition for an arrangement under sec. 211. A creditor took out a summons against a trader, under which the trader admitted the debt, and the creditor afterwards filed a petition of adjudication. In the meantime, before the seven days limited by the 81st section of the Bankruptcy Act had expired, the trader filed a petition under the arrangement clauses of the Bankrupt Act, and obtained protection accordingly: Held, that the trader, by proceeding under the arrangement clauses, could not stop the adjudication of bankruptcy under the trader-debtor summons. But *semble*, if the creditor had not used due diligence, the court would have stopped the adjudication. *Exp. Walker, re Haywood*, Week. Rep. 1854-5, p. 647.

PROOF.—*Contingent liability—Bankruptcy Consolidation Act, s. 178—Damages in an action of tort—Reference to arbitration.*—We have in another work (Key to Examination Questions, div. "Bankruptcy") referred to the difficult subject of proof for a claim in an action of tort where a verdict has been taken subject to a reference as to the amount of damages, and bankruptcy comes before any award. An ingenious attempt has been made to press sec. 178 of the Consolidation Act into the service of the party asserting that such damages can be proved. That section provides, that if any trader shall become bankrupt, and shall have contracted before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provisions of this act, the person with whom such liability shall have been contracted shall be admitted to claim for such sum as the court shall think fit; and after the contingency shall have happened and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition. *Exp. Todd, re Williamson*, Week. Rep. 1854-5, p. 644.

PROFESSIONAL NEWS.

REGULATIONS AS TO POSTAGE STAMPS.—The following information contained in a notice issued by the Stamp Office authorities may be of service to our readers:—The Board of Inland Revenue have in conformity with the provisions of the 4th section of the 18 & 19 Vic. c. 78, provided the necessary apparatus for impressing with postage-stamps paper sent in by the public for the covers or envelopes of letters. Notice is therefore given, that the Board are now prepared to receive paper, to be delivered at the Head Office, Somerset House, London, for the purpose of being impressed with stamps for denoting the several rates of postage, subject to the following regulations, namely:—When the amount of the stamps required by any person shall not exceed £10, a fee of 1s. will be charged in addition to the duty, if paper of one size only be sent in, and if more than one size be sent in, then a fee of 1s. for each size. On the warrants hereafter-mentioned, no fee will be payable, but the sizes of paper will be restricted as follows:—When the amount exceeds £10, and is under £20, paper of one size only will be received. If the amount exceeds £20, and is under £30, two sizes of paper only will be received; £30, and under £40, three sizes of paper; £40, and under £50, four sizes of paper; and not more than four sizes of paper will be allowed to be included in any one warrant of however high an amount. No folded envelopes can be stamped, and therefore paper, whether intended for envelopes or letters, must be sent in unfolded, and every distinct size and form of envelopes or paper must be marked so as to indicate the place on which the stamp is to be impressed, in order that it may appear in the proper position according to the rules of the Post-office, when the envelope or letter is folded and made up. No coloured paper can be received for stamping, nor any paper of such thinness as not to bear the impression of the dies. Envelopes provided by this office, with the proper stamps thereon, will be substituted for any of those sent in which may be spoiled in the operation of stamping. It should be borne in mind that licensed vendors only are authorised to sell postage-stamps impressed as above-mentioned, or any other.

ASSIZES FOR THE WEST RIDING OF YORKSHIRE.—A movement has lately been commenced for the removal of the assizes for the West Riding of Yorkshire from the city of York to some town in the centre of the West Riding. The movement originated in Wakefield, the borough council of which town have just adopted a petition to her Majesty in council, praying for the removal of the assizes from York, and the appointment of Wakefield

as the assize town of the Riding. The Leeds borough council have also taken the matter up, and have also petitioned her Majesty in behalf of Leeds, on the ground that a large proportion of the business now tried at the York assizes goes from that town; and it is a large and important place, with excellent railway accommodation; and that it has courts now in the course of erection admirably adapted for the business of the assizes. Meantime the inhabitants of the North and East Ridings have not been idle, and at a meeting of the magistrates of these Ridings, lately held at York, and presided over by the Earl of Zetland, it was unanimously resolved to present a petition to her Majesty, praying that the assizes for the county may not be divided, and that they may still continue to be held at York.

THE FORTHCOMING MICHAELMAS TERM.—The 23rd of October ended the long vacation, and the lists of "arrears," as they are termed of the common law courts for the ensuing Michaelmas Term have appeared. Such a list has seldom or never been seen. The aggregate of the three courts is only 57. In the Queen's Bench the number is 37, of which 4 rules are new trials, 3 of which have been standing for some time, and will now be cleared from the list. In the special paper is one rule for judgment, and 25 for argument, including several county court appeals. There are 7 enlarged rules. In the Common Pleas only 5 matters appear—3 new trial rules, 1 enlarged rule, and 1 demurrer; and in the Court of Exchequer the number is only 15. Of that number 1 stands in the special paper for judgment, and 10 for argument, whilst of new trials there is 1 for judgment and 3 for argument. Notwithstanding the smallness of these numbers the common law is "looking up," and the present appearance of the courts is in a great measure owing to the Common Law Procedure Acts. On the commencement of the term, Mr. Justice Willes will, for the first time since his promotion, grace with his presence the judicial bench of Westminster Hall as one of the judges of the Court of Common Pleas.

RETIREMENT FROM THE LEEDS MAGISTRACY OF JOHN HOPE SHAW, Esq.—We regret to learn that John Hope Shaw, Esq., one of the Leeds magistrates, has announced his intention to retire from the bench. Among the causes of Mr. Shaw's resignation is the refusal elsewhere referred to, of the present Lord Chancellor and his predecessor to place upon the commission of the peace practising attorneys. This refusal, in the opinion of Mr. Shaw, conveyed an imputation upon that branch of the legal profession to which Mr. Shaw belongs, that he would, we believe, have retired from the bench at once had it not been for the peculiar position in which the Leeds justices are at this moment placed by having an insufficient number of gentlemen in the commission of the peace for the borough.

A SOLICITOR'S LIBRARY.

(Continued from p. 96).

Precedents in Conveyancing.—In addition to the precedents enumerated *ante*, p. 96, we may refer to some others as being of service for occasional use. Among these are Barton's "Modern Precedents in Conveyancing" 3rd edit., in 7 vols., 1821, which may be bought second-hand for quite a trifle. To this work a supplement has been published by Mr. S. F. T. Wilde, entitled "A supplement to (C. Barton's) Precedents in Conveyancing." The 3rd edit., is by C. Barton jun., in 3 vols., and appeared about 1826. This can be purchased rather cheaply though not for so small a sum as Mr. Barton's work. It is esteemed more useful than the original work. A work which we have found useful in practice is "Bone's Precedents in Conveyancing," by Mr. T. G. Western, in 4 vols., 1841, price £3 12s., but which can be purchased for about 14s. It is usual to speak disparagingly of this work, and it has been said that the best part about it is that which was taken from Jarman's "Collection of Forms," and, certainly, the notes are beneath criticism, but the forms are many of them very useful, and in general correct. To those who cannot afford Jarman's or Davidson's larger work, we would recommend "Bone's Precedents" in preference to Crabb's. Mr. Davidson's "Concise Precedents in Conveyancing" (of which a 4th edit., price 9s., has lately appeared), is a mere students book, though occasionally something useful may be obtained by a reference to it.

Landlord and Tenant.—The principal book on this very important branch of the law, and one upon which solicitors are always expected to know something, is that called "Harrison's Woodfall's Landlord and Tenant," the seventh edition of which, edited by Mr. Woolaston, is in the press. It is very well got up, and presents a very full and, in general, accurate, view of the law of landlord and tenant. A smaller and more elementary work, which would form a very useful compass to the above, is the late Mr. Smith's "Law of Landlord and Tenant," edited by Mr. F. P. Maude, which has recently appeared, price 14s. Those who cannot afford Harrison's work will find Mr. Smith's very useful though, of course, the full detail of the other work is wanting. But what there is will be found reliable, and many things are here explained which the larger work does not notice, because they are matters not to be found in the reports, being rules deducible from the decided cases framed by one who was in every way capable of performing such a labour. To those who desire to add another work to their library, we can recommend Mr.

Platt's work on Leases, which contains also some precedents. There is a good deal of information to be found in Mr. Platt's work, but the price is heavy being £2 10s.; there are two volumes, and they bring down the law to a recent period.

Wills.—As solicitors are so liable to be called on at a moment's notice to frame a will, it especially behoves them to give attention to this branch of their business, and, as in the hurry consequent on the performance of this part of their duties, solicitors are frequently unable to consult any works, it is desirable they should carefully study beforehand the general doctrines, and also some well-drawn precedents. The work which may be said to be beyond all competition is that of Mr. Jarman, which, however, contains no forms. There are two volumes, and a second edition, which, unfortunately, is not edited by Mr. Jarman, has just appeared, price £3 3s. Another work, quite as good and valuable in its province, is the volume of "Jarman's Conveyancing," relating to wills, of which an edition by Messrs. Sweet and Bissett, price £1 12s., appeared two or three years ago. This contains precedents, with, however, some considerable text-matter of great utility. Indeed, to the draftsman it is an indispensable work, and few conveyancing counsel are without it. It is impossible to explain, within our present limits, the features which constitute its excellence; it must be used to be fully appreciated. Should the practitioner not desire so expensive or bulky a volume (the very profusion and number of whose forms is to one unused to the work somewhat tantalizing), he will find the last edition of Hayes and Jarman's "Concise Forms of Wills" very useful. The price is 15s. This volume, which is a small one, is enriched by valuable notes, and in the opinion of some its chief value lies in them, as the forms are considered too concise to be of great assistance. This is, however, the language of conveyancing counsel who have been accustomed to the fuller and more conveniently arranged work, in Jarman's "Precedents," and is not, we think, altogether warranted. There is another somewhat similar, but much inferior work by Mr. J. T. Christie (not the eminent conveyancer, though many we know have supposed otherwise, but the same party who edited the last edition of Crabb's "Precedents," which is no recommendation), entitled "Concise Precedents of Wills, with an Introduction and Practical Notes, adapted chiefly as a Manual for the ready use of Solicitors." The price is 8s. only. To those who wish to be acquainted with the alterations effected by the late Wills Act, the little work of Mr. Shelford will be useful, as connecting the old and new law, and presenting them both in a readable compass. It can be purchased very cheaply.

VENDORS AND PURCHASERS.

THERE are now so many cases reported upon the subject of the law and practice of vendors and purchasers; and solicitors, particularly those in the country, who cannot readily consult counsel, are so much interested in them, that we intend for the future to notice them at some length and under a separate heading. In very many cases, solicitors are compelled to act on their own judgment of what they conceive to be right, either in respect of a negotiation for a sale, or in the course of the proceedings between the contract and the execution of the conveyance, that it cannot but be useful to them to know what points have been decided by the courts respecting the law of vendors and purchasers.

CONTRACT BY OFFER AND ACCEPTANCE [*ante*, p. 49].—*Varying proposal before acceptance—Non-payment of deposit money at fixed time—Acceptance of offer subject to terms of contract being arranged between the solicitors of the parties.*—

A contract for sale is frequently made by a written offer to sell or purchase, followed by a written acceptance of the offer; the acceptance, in order to bind the proposer, should be a simple acceptance, neither more nor less, of the offer. For the offer, unless accepted *simpliciter*, may be withdrawn or even varied (*Holland v. Eyre*, 2 Sim. and Stu. 194; *Lucas v. James*, 7 Hare, 410; *Thornbury v. Bevell*, 1 You. and Coll., C.C. 554, 563; 6 Jur. 407). Thus, if a vendor, the owner of property, writes to another person stating, "I am willing to sell my estate to you for £25,000," with certain other terms, if the person, to whom that communication is addressed, writes in answer, "I accept your offer," without saying anything more, that binds both parties, and neither party is at liberty to add to or qualify the terms of the contract. This is what is termed a contract by offer and acceptance. But if before the person to whom the letter is sent, returns an answer, the person who makes the offer, says, "I omitted something which I consider essential, and I desire that this" (mentioning something further) "shall be one of the terms of the contract," he is at full liberty to vary his proposal, and, in fact, if his offer is not accepted—if, for instance, the other party should reject the contract—then the matter is at an end, and it is no longer in the power of the other party, even if he wished to do so, to accept the offer at a later period. This will explain the following decision:—"A. offered by letter to purchase an estate for £25,000. The vendor, also by letter, accepted the offer, 'subject to the terms of a contract being arranged between their solicitors,' and requiring a deposit of from £1,200 to £1,500. The

vendor's solicitor afterwards sent a draft of agreement to A.'s solicitor for perusal, reciting the payment of the £1,500 deposit money on the day of the date of the agreement, which was left blank, and before it was returned wrote a letter, stating that unless the agreement was completed and the deposit paid before a particular day, named by him, the vendor would consider the treaty at an end. A.'s solicitor wrote in answer that he approved the agreement on his client's behalf, save as to the amount of the deposit money, and requested further time to complete. The vendor's solicitor then enlarged the time for completion, again stating that unless the £1,500 deposit money was paid by the day then specified, the vendor would proceed to the sale of the property. The money not being paid on that day, the vendor's solicitor immediately wrote that the treaty was at an end. A few days afterwards A. tendered the £1,500, and offered to agree to the terms of the draft as originally furnished. This offer was refused. Upon demurrer to bill for specific performance, it was held: 1st. That there was no concluded contract between the parties, but only a contract to enter into a contract, of which three of the terms were specified, viz., the purchase money, the time when the contract should be completed, and the amount of the deposit, and that the rest of the contract (including the time for the payment of the deposit) was to be made the subject of future communication between the parties themselves. Secondly: that before the terms, originally proposed, were accepted, the vendor had a right to fix a time for the payment of the deposit money, and make time of the essence of the contract [see *infra*], and the demurrer was allowed. The Master of the Rolls said that if the words "subject to the terms of a contract, being arranged between their solicitors," had been omitted from the vendor's letter, the two letters would have proved a complete and perfect contract, such as a court of equity would have enforced. And so, if on the receipt of the draft agreement, he had written that he agreed to and was ready to execute the agreement; and that in neither case could the vendor have afterwards added an additional term. *Honeyman v. Marryat*, 1 Jur. N. S. 857.

TIME BEING OF THE ESSENCE OF THE CONTRACT.—It is pretty well established that a party to a contract may, by a proper and clear stipulation to that effect, make time of the essence of the contract; and, in such a case, courts of equity, though in general averse to allow effect to such a stipulation, will permit the party to avail himself of it. In the above case of *Honeyman v. Marryat* (1 Jur. N. S. 859), the Master of the Rolls observed that the Court of Chancery does not,

except in very special cases, allow time to be of the essence of the contract. But this unwillingness to admit of time being of the essence of the contract, does not apply to an incomplete agreement, as where in the course of a negotiation for a contract, a party insists that a time shall be fixed for the payment of a deposit; as, for example, on the execution of the contract on a particular day named, and the other party fails to comply with that stipulation, there is nothing for the court to relieve against; except, indeed, the stipulation should be an unreasonable one, or being manifestly proposed for the purpose of preventing the completion of the contract. In those cases, as the Master of the Rolls observed, where a court of equity does not admit time to be of the essence of the contract, there is a *concluded* agreement—a contract actually completed; and then the court considers it inequitable that, by reason of a slight delay of two or three days, one party to the contract should be deprived of the benefit for which he has contracted. *Honeyman v. Marryatt*, 1 Jur. N. S. 859.

SPECIFIC PERFORMANCE.—*Delay of party in enforcing contract—Agency.*—In *Milward v. Mary Thanet* (cited in the note to 5 Ves. 720), Lord Alvanley repeated the well known dictum, that a party seeking specific performance must show himself “ready, desirous, prompt, and eager.” There is some difference between a case of a deposit having been paid (which may be lost by the refusal to grant specific performance, see *Harrington v. Wheeler*, 4 Ves. 686), and where no deposit is paid. A delay by a purchaser for three years in taking steps is fatal to the application for specific performance. These observations will explain the following case and decision:—Lands being settled to one for life, remainder to her ten children in fee, all parties agreed to endeavour to effect a sale in order, if possible, to increase the income of the tenant for life. W., one of the ten children, took upon himself to act for all the others, and contracted in April, 1851 to sell to F. No deposit was made, nor any step taken. An abstract was first asked for by the purchaser in February, 1852, and delivered by W on behalf of all parties. B, another of the children (who had certain liens on the shares of four others, which he perfected after April, 1851), denied altogether the authority of W to act for him. The tenant for life died in Sept., 1852, and in the same year R, one of the four children whose interests B had so got in for his own benefit, confirmed the sale to F. No other step was taken against B till May, 1854, when F, having got five of the shares, filed a bill against B for a conveyance of the other five. Held by V. C. Wood, apart from the question as to the agency of W, that on the ground of delay the pur-

chaser was not entitled to a specific performance against B, except as to the share of R, for when B put the plaintiff at arms length, by denying the authority of W to act for him, he ought to have insisted on his contract, and to have taken steps at once for specific performance. The bill was dismissed with costs as to B's original share; and no costs were given as to the other shares. *Firth v. Greenwood*, Week. Rep. 1854-5, p. 358; 1 Jur. N. S. 866.

CONTRACT TO GRANT AN UNDER-LEASE.—*Reference to covenants in original lease—Certain restrictive covenants not to be inserted in under-lease which turn out to be in original lease—Reasonable time for granting a lease.*—The following decision will, we venture to say, give rise to much difficulty and uncertainty, as to the construction of contracts for underleases, and it certainly runs counter to what has hitherto been the received opinion of the profession on such contracts. This decision, in effect, lays it down that if a lessee has a lease which contains certain restrictive covenants, he can enforce an agreement by him to grant an underlease without such or any restrictive covenants, though the other party was not at the time aware that such restrictive covenants were in the original lease. If the intended under-lessee should say, “Is there anything to prevent (for example) my carrying on the business of a retailer of beer?” and the intended sub-lessor should answer, “I think not;” thereupon, according to the decision, the plaintiff is to be considered, in effect, saying, “Insert in the lease the usual covenants; insert all the covenants in the head lease, if they do not prohibit the carrying on of the business of a retailer of beer. I shall then have a lease that will not in its terms prevent me carrying on the business; and if there be any contract between yourself and your head landlord, and I am turned out in consequence, I shall have my remedy over against you by the covenant for quiet enjoyment;” the object not being that the lessor should guarantee that there was no such covenant in the original lease, but that the plaintiff should get a lease without such a covenant. We need hardly observe that this doctrine is not likely to be adopted by courts of equity on questions of specific performance, at least, not where the intended under-lessee is ignorant of the existence of the restrictive covenants. M, the lessee of premises, agreed with the plaintiff to grant him a sub-lease for twenty-one years, “the lease to contain all the usual and proper covenants, and particularly those contained in the lease under which the premises are held, so that the same in no way restrict the trade of a retailer of beer . . . the lease to be prepared by the lessor.” The plaintiff saying that he wanted the premises for the purpose of a beer-

house, had asked M's agent, before the agreement was drawn up, whether there was anything in the original lease to prevent such a use of the premises, the agent replied, not to his knowledge. The original lease did in fact contain a covenant against carrying on the trade of a retailer of beer, with a proviso for re-entry for the breach of the covenant. On the signing of the agreement, the plaintiff entered on the premises, and, after about five months, M sent the plaintiff a draft lease containing a covenant against carrying on the trade of a retailer of beer. M died a month afterwards, the draft lease not having been returned by the plaintiff. Between four and five months after M's death, the defendant (his executors) offered to grant the plaintiff a lease according to the terms of the agreement. Held, first, that the meaning of the agreement was, that M should grant the plaintiff a lease without the restrictive covenant, whether the original lease contained such a covenant or not: "the object was not that the lessor should guarantee that there was no such covenant in the original lease, but that the plaintiff should get a lease without such a covenant." "If the head landlord entered because the business of a retailer of beer was carried on, then, though the plaintiff might be turned out, he would have his remedy against his lessor." Secondly, that under the circumstances a reasonable time for granting the lease had not elapsed at M's death; and that the defendant's offer was made within a reasonable time after his death; and that the plaintiff could not, therefore, maintain an action for the breach of the agreement. *Hayward v. Parke*, 1 Jur. N. S. 781.

CONTRACT.—*Reference to parcels in an annexed plan or map, which is afterwards lost*—*Secondary evidence.*—In a contract of sale of lands, the premises were expressed to be delineated or described in a map or plan signed by the parties to that contract. The master having found that the map or plan of the property referred to in the agreement was lost, the court held that extrinsic evidence was admissible to prove the parcels mentioned in the agreement, for parcel or no parcel is, according to ordinary rules, a question on which extrinsic evidence is admissible; indeed, the common description of the persons in whose possession lands are, or lately were, is framed in order to admit extrinsic evidence. *Andrews v. Andrews*, 1 Jur. N. S. 885.

THE STATUTES, 1854. (17 & 18 VICTORIA).

THE following is a list and statement taken from a recent report of the Incorporated Law Society, of the principal acts passed in the Session of Parliament

held in 1854; and though, as will be seen, we have noticed most, if not all, of the acts in our first volume, this summary account of them will, we are sure, be useful to our readers generally:—

Second Common Law Procedure Act [vol. 1, pp. 155, 163].—The most important act was the second Common Law Procedure Act (17 & 18 Vic. c. 125), which effected improvements, not only in the modes and forms of procedure, but in the jurisdiction of the courts, facilitating and expediting the proceedings and diminishing the expenses of the suitors. Thus it enables the judges to try questions of fact by consent without a jury; to order cases of complicated accounts to be forthwith referred to arbitration; to examine the parties before trial; and obtain a full discovery of documents. Trials also may be adjourned; and the restrictions may be relaxed in cross-examining witnesses, and the contradiction of a party's own witnesses. Proof of handwriting by comparison may be admitted; documents insufficiently stamped are receivable in evidence on payment of the duty and a penalty. An appeal may be made on the refusal of a new trial; the oral examination of witnesses may take place on motions and summonses; injunctions may be issued; and judgment-debtors may be examined to discover their assets; which may be attached or taken in execution.

Witnesses out of Jurisdiction [vol. 1, p. 135].—Under the Witnesses Act (17 & 18 Vic. c. 34), witnesses in Ireland or Scotland may be compelled to attend and give evidence in England, and witnesses in England to give evidence in the Irish and Scotch courts; but reserving the power of examining them before commissioners.

Registering Bills of Sale [vol. 1, p. 136].—The act for Registering Bills of Sale of personal property within twenty-one days, like warrants of attorney, is designed to prevent frauds on creditors (17 & 18 Vic. c. 36).

Chancery Dispatch Act.—An act was also passed "to make further provisions for the more speedy and effectual dispatch of business" in Chancery, by appointing additional temporary clerks and accountants to wind up the matters depending in the remaining masters' offices, and, in case of need, to call in the aid of the solicitor to the suitors' fund (17 & 18 Vic. c. 100).

Lancaster Court of Chancery.—Another act was passed extending the jurisdiction of the Court of Chancery of the county palatine of Lancaster against persons residing out of its jurisdiction, and transferring appeals to the Lords Justices in Chancery instead of the judges of assize (17 & 18 Vic. c. 82).

Bankruptcy [vol. 1, pp. 152, 154].—The Bankruptcy Act enables the Lord Chancellor to diminish the expense of the establishment by not filling up

the present or future vacancies; and it provides that a petitioning trader must show that his assets amount to £150 (17 & 18 Vic. c. 119).

Evidence in Ecclesiastical Courts [vol. 1, p. 186].—An act passed for taking evidence in ecclesiastical courts *vivâ voce* (17 & 18 Vic. c. 47); and another act authorising the appointment of commissioners to administer oaths and take declarations, &c., relating to proceedings in the Admiralty Court, and providing that the commissioners for administering oaths in chancery may also take affidavits, declarations, &c., in proceedings in the Admiralty Court (17 & 18 Vic. c. 78).

Administration of Assets [vol. 1, p. 154].—The Real Estate Charges Act (17 & 18 Vic. c. 113) directs that in case of intestacy the heir shall not be entitled to have the incumbrance on the estate paid out of the personal property. There is a statement to the effect that the 17 & 18 Vic. c. 113, contains a clause that where a testator makes a will, and directs his estate to be sold, and does not otherwise direct, the land shall be deemed to be personal estate, but this is a mistake.

Acknowledgments by married women [vol. 1, p. 150].—An act was also passed to remove doubts concerning the due acknowledgment of deeds by married women (17 & 18 Vic. c. 75); whereby the deeds already acknowledged are, after the certificate of acknowledgment has been filed, rendered valid, although one or both of the commissioners have been interested in the transaction, with certain exceptions in cases wherein proceedings were then pending; but authorising the Court of Common Pleas to make rules for preventing commissioners who are interested from taking acknowledgments.

Usury [vol. 1, p. 150].—The total repeal of the Usury Laws has also taken place (17 & 18 Vic. c. 90); saving transactions previous to the act, and providing that the legal or current rate of interest now payable on any contract shall mean the same as if the act had not passed.

Stamp duties [vol. 1, p. 150–152].—The act to amend the law relating to the stamp duties (17 & 18 Vic. c. 83), provides a new scale for inland and foreign bills and notes; also on leases for terms exceeding thirty-five years, regulated by the amount of rent, and on duplicates or counterparts; with provisions as to adhesive stamps on bills and bankers' drafts; repealing the exemption from receipt stamp duty on letters of acknowledgment; directing that deeds made for several valuable considerations shall be chargeable in respect of each; and indemnifying parties from omitting to state the full purchase money in assignments on the sale of the good-will of a business.

NOTICES OF NEW BOOKS.

OKE'S FRIENDLY SOCIETIES' MANUAL.

The Friendly Societies' Manual, comprising The New Consolidation Act, 18 & 19 Vic. c. 63, and other Statutes Affecting Old and New Societies, as well as Industrial Societies, Methodically Arranged; with an Exemplification of the Official System of Bookkeeping, Rules, Tables of Contributions, Cases, Forms, &c. &c. &c. By G. C. Oke, Author of The Magisterial Synopsis and Formulist, Law of Turnpike Roads, &c. &c. London: BUTTERWORTHS.

WE have before (p. 62) referred to the act of last session (c. lxiii.), for the Consolidation of the previous Acts relating to Friendly Societies, and we now find that the profession is furnished with a little work, by Mr. Oke, on the new act and previous statutes. We know from experience how difficult it is to carry in the head the provisions of various statutes relating to subjects of a class character, and it is on this very account that we always feel thankful for a manual which, collecting in a small space all the statutes and laws, enables us at once to discover what we may be in search of, and we are sure the profession will be thankful to Mr. Oke for supplying them with the present manual. After giving an introductory statement or outline of the old and new laws, the work proceeds, in chap. i., to treat of the old societies formed previously to the 1st of August, 1855. Whilst the second chapter is devoted to new societies, formed under the 18 & 19 Vic. c. 63., chap. iii. treats of assurance companies formerly within the friendly societies acts; chap. iv. contains suggestions, model rules, and tables of contributions; whilst chap. v. furnishes an exemplification of the official system of bookkeeping.

Part II. treats of Industrial and Provident Societies. A good Index concludes the work, which appears to us to be an indispensable one to a practitioner likely to be consulted on the subject of friendly societies. The work is accompanied by what are termed notes to each section, in which much practical information is given. As a specimen of the work, we take sec. 1 of chap. ii., and which section is entitled, "For what Purposes a Friendly Society may hereafter be formed:"—

"SEC. 9. It shall be lawful for any number of persons to form and establish a friendly society, under the provisions of this act, for the purpose of raising, by voluntary subscriptions of the members thereof, with or without the aid of donations, a fund for any of the following objects (that is to say):—

"1. 'For payments on death.—For insuring a sum of money to be paid on the birth of a member's child,—or on the death of a member,—or for the funeral expenses of the wife or child of a member:

"2. 'For relief in sickness, &c.—For the relief or maintenance of the members,—their husbands,—wives,—children,—brothers or sisters,—nephews or nieces,—in old age, sickness or widowhood,—or the endowment of members or nominees of members at any age :

"3. 'For other purpose authorised by secretary of state, &c.—For any purpose which shall be authorised by one of her Majesty's principal secretaries of state, or in Scotland, by the lord advocate, as a purpose to which the powers and facilities of this act ought to be extended :

"4. 'Provided that no member shall subscribe or contract for an annuity exceeding thirty pounds per annum, or a sum payable on death, or on any other contingency, exceeding £200 :

"And if such persons so intending to form and establish such society shall transmit rules for the government, guidance, and regulation of the same, to the registrar aforesaid, and shall obtain his certificate that the same are in conformity with law as hereinafter mentioned [see *post*, p. 79], then the said society shall be deemed to be fully formed and established from the date of the said certificate."

"NOTE.—The provision for insuring a sum of money to be paid on the birth of a member's child is new; but at the same time the specific objects for which friendly societies may in future be formed have been restricted, for by the 13 & 14 Vic. c. 115, s. 2 (*ante*, p. 52), societies might insure against loss or damage by fire, flood, &c., might raise a fund for the frugal investments of the savings of members to enable them to purchase food, tools, &c.; or to enable members and their families to emigrate. The purposes expressed in the above section, taken in conjunction with sec. 10 (*post*, p. 93), as to burial money, may be practically stated to be these :—

"1. For insuring not exceeding £200 on the birth of a member's child. [This partakes of the nature of an endowment, and being so would come more properly within the province of a life assurance office, see Chapter IV., *post*, for suggestions hereon].

"2. For insuring not exceeding £200 on the death of a member.

"3. For insuring not exceeding £200 to be paid for the funeral expenses of the wife of a member.

"4. For insuring not exceeding £6 for the funeral expenses of a child of a member under the age of five years.

"5. For insuring not exceeding £10 for the funeral expenses of a child of a member between five and ten years of age [Above the age of ten the child might himself become a member, see s. 15, *post*, p. 113].

"6. For the relief or maintenance of the members, their husbands, wives, children, brothers or sisters,

nephews or nieces in old age,—sickness,—or widowhood. [This is accomplished in the case of old age or widowhood, by the members contributing monthly sums for an annuity for himself of not exceeding £30 per annum, to commence at the age of, say sixty or sixty-five, or for a definite sum, not exceeding £200 payable at either of those ages, or for the like sums, or one of them, for the member's widow on the death of the member whenever it should happen: in the case of sickness, by the member contributing a monthly sum for a weekly allowance (of which there is no limit in the present act), as well as for medical attendance, during the continuance of the illness, up to the age of sixty or sixty-five].

"7. For the endowment of members at any age [This would apply to the insurance of a definite sum not exceeding £200 or an annuity not exceeding £30 to be payable or commencing at any early age, say fifty].

"8. For the endowment of the nominees of members at any age [This will apply to the insurance of a sum not exceeding £200, or an annuity not exceeding £30 payable on a child attaining his majority or any other age; or a third party arriving at those ages].

"[Vide the Suggestions and Tables of Contributions in Chapter, IV., *post*.]

"As to the third purpose mentioned in the above section, vide the observations in the Introduction, p. 13, *note*.

"As to donations, if they are not paid as in aid of any particular fund of the society they might be placed to the fund required by s. 25, *infra*, to be kept distinct for the expenses of management.

"Upon the point, when the society is to be considered for certain purposes as legally established, there are the two following cases: *Jones v. Wooliam*, 5 B. & Ald. 769, where it was held, that a bond given to the treasurer of a benefit society for the use of the society was an available security at common law, although the rules of the society had not been confirmed pursuant to the statute then in force relating to friendly societies. *Margett v. Parkes*, 1 Dowl. & L. 582, which was an action of assumpsit by the treasurer of a friendly society on a note, it was held, that an averment that the rules were filed under the 10 Geo. 4, c. 56, before the making of the promise, was not material, and an objection that they were not filed until after the making of the note, but before it became due, was invalid. *Bradburne v. Whitbread*, 6 Sc. N. C. 284, which was the case of an unstamped promissory note given to the trustees of a loan society established under the Loan Societies Act, and made before the rules were enrolled, but after they had

been certified, the court held that the enrolment of the rules before the commencement of the action was sufficient to enable the trustees to recover."

One other extract we must give from sec. 12 of the same chapter, on the subject of the Determination of Disputes, as affording a better specimen of Mr. Oke's labours:—

"SEC. 40. 'Every dispute between any member or members of any society established under this act or any of the acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society,—and the decision so made shall be binding and conclusive on all parties, without appeal:

"Provided that where the rules of any society established under any of the acts hereby repealed shall have directed disputes to be referred to justices, such disputes shall, from and after the 1st day of August, 1855, be referred to and decided by the county court as hereinafter mentioned."

"NOTE.—This section and section 41 entirely take away the jurisdiction of justices of the peace to hear and determine disputes in relation to old friendly societies, and also, I conceive, where disputes arise in consequence of members being enrolled or serving in the militia (see *ante*, p. 60, *note*).

"It will be desirable in societies to be formed, that the mode of determining disputes through the county court provided for by the above and following sections should be universally adopted. To effect this, the usual rule for settlement of disputes may be omitted altogether.

"These sections entirely exclude the jurisdiction of the superior courts, as will be seen from the following cases:—*Crisp v. Bunbury*, 8 Bing. 394; *Timms v. Williams*, 3 Ad. & El. (N. S.) 418; 3 Q. B. Rep. 418; *Ex parte Payne*, 5 Dowl. & L. 679; 13 Jur. 634; *Trott v. Hughes*, V. C. Cranworth, Dec. 1850, M. S.; *Reeves v. White*, 17 Q. B. Rep. 995; 16 J. P. 118; *Grinham v. Card*, 7 Exch. Rep. 833.

"SEC. 41. 'In what cases by the county court.—In all friendly societies established under this act or any of the said repealed acts, all applications for the removal of any trustee,—or for any other relief, order or direction,—or for the settlement of disputes that may arise or may have arisen in any society, the rules of which do not prescribe any other mode of settling such disputes,—or to enforce the decision of any arbitrators,—or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made

by the member or person claiming through or under a member or under the rules of the society,—shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate:

"And such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction:

"*Decision final*.—'And the decision of such county court upon and in relation to such application as aforesaid shall not be subject to any appeal:

"*In Scotland*.—'Provided always, that in Scotland the sheriff within his county, and in Ireland the assistant barrister within his district, shall have the same jurisdiction as is hereby given to the judge of a county court."

"NOTE.—In addition to the matters and disputes here placed within the jurisdiction of the county court, there are the disputes arising by reason of a member's enrolment in the militia given to justices by the Amended Militia Act, 17 & 18 Vic. c. 105, s. 44, see *ante*, p. 60, *note*, and the case of a member dissatisfied with the provision made on the dissolution of a society (see s. 13, p. 127). As to against whom the proceedings must be brought on behalf of a friendly society, *vide* s. 19, *ante*, p. 96.

"The following decisions which have been given in reference to the jurisdiction of justices to settle disputes, &c., under the repealed acts may be found useful in similar cases before the county court:—

"*R. v. Godolphin*, and *Ex parte Norrish*, *ante*, p. 83; and *Reg. v. Cotton*, *ante*, p. 84, as to the legal alterations of rules:

"*Hodges v. Wale*, *ante*, p. 88, as to the power to remove a trustee, and p. 84 as to the registrar's certificate being conclusive of the legal establishment of a society:

"*In re The Eclipse Mutual Benefit Society*, *ante*, p. 111, as to the power of the court to appoint a person to convey property in possession of an unwilling trustee:

"*In Grinham v. Card*, 7 Exch. Rep. 833, where, by the rules of a friendly society, disputes between members and the trustees may be referred to the arbitration of a certain number of the committee, a dispute which affects the interests of all the individual members of the society, arising between some of its members who are also members of the committee and the trustees, where the question is not one which necessarily requires that recourse should be had to a Court of Equity, such dispute could not

be referred to the judge of the county court, under a. 22 of the repealed act, 13 & 14 Vic. c. 115, *ante*, p. 71, but must be referred to other members of the committee; also, where a dispute arose between two of the members of the committee of a friendly society and the trustee, touching the distribution of a fund in the hands of the latter; and, by one of the rules of the society, it was ordered that disputes were to be referred to such members of the committee as should not be personally interested in the matter:—Held, that the judge of the county court had no jurisdiction in such case, and the court granted a prohibition against further proceedings in a plaint issued out of the court over which he presided.

“The words ‘every dispute’ must be read as referring only to disputes between the society and the members as members, and not in any other capacity they may be placed in, by having the funds of the society advanced to them by way of mortgage, or on loan on the security of their policies. See upon this point, *Morrison v. Glover*, 4 Exch. Rep. 430; 19 Law J. (Exch.) 20; *Crisp v. Bunbury*, 8 Bing. 394; 1 Law J. (C. P.) 112; *Fleming v. Self*; 1 Kay, 518; *Reg. v. Trafford*, 24 Law J. (M. C.) 20.

“*Reg. v. Grant*, 14 Q. B. Rep. 43; 13 Jur. 1027; 19 Law J. 62, where, by the rules of a society it was declared, that all matters in dispute should be referred to arbitrators, who were to hear evidence on both sides. It was held, that as the arbitrators had refused to hear evidence on the part of the member, the award made by them was not made according to the true meaning of the rules, and therefore not final and binding, and that the jurisdiction given to justices in case of no award being made, intended an award final and binding; and that, therefore, the justices had power to make an order upon the matter in dispute; but where the arbitrators have heard the case, although they come to a wrong conclusion, the county court will have no jurisdiction, as will be seen by the case *Ex parte Long*, 2 Weekly Reporter, 18; 24 Law T. 73, Q. B., which was an application for a mandamus to a magistrate to hear a dispute already decided by arbitrators, the award being final by sec. 7 of 4 & 5 Will. 4, c. 40, and not shown to be a nullity. Also, in the case of *Reg. v. Evans*, 3 E. & B., 363; 18 J. P. 247; 18 Jur. 696, where D., having been expelled by a friendly society, gave notice to refer the dispute to arbitration, and signed an agreement to be bound by the award of five out of nine persons, who after his expulsion had been appointed arbitrators in the room of nine others appointed at the first meeting of the society, of which nine two had become incapable of acting, and the other seven had

been alleged, but this was disputed, to have left the place. The award confirmed the expulsion of D. Afterwards the society gave notice of a meeting for rehearing D.’s case, but D. refused to refer it again, and took out a summons before justices, who made an order for his readmission:—Held, that the award of the arbitrators was binding, and that the order of the justices was made without jurisdiction.

“The jurisdiction of the county court must, it would seem from the following cases, be confined strictly, to the subject-matter of complaint. In *Rex v. Soper*, 3 Barn. & Cr. 857, where it appeared that the party had complained to the justices that he had been deprived of relief to which he was entitled, and the justices awarded not only that the steward should give him such relief, but also that the party should be continued a member of the society; it was held, that the latter part of the order was illegal, inasmuch as the expulsion of the party was no part of the complaint. *Rex v. Wade*, 1 B. & Ad. 861, decided that an indictment lay against the president and stewards of a friendly society for disobeying an order of justices addressed to them, to re-admit a member, though it was sworn that the power of doing so was not in them, but in a committee: and in *Rex v. Gash*, 1 Stark. 441, where upon a complaint made by an excluded member the then stewards were summoned, and an order was made that they and other members of the society should reinstate the complainant. The order was served on the stewards after they had ceased to be so, but it was held, that it was still obligatory upon them as members to attempt to reinstate the complainant, and that their having ceased to be stewards was no justification of entire neglect on their part. On an indictment against the officers of a friendly society, for not re-admitting a member on the order of justices, it was held to be no defence that the party was not eligible to be a member by the rules, as that was matter of defence before the justices; *Rex v. Gilkes*, 2 Car. & P. 52.”

BOURDIN'S LAND TAX.

I. *A Guide to the Redemption of the Land Tax; containing an Analysis of the several Acts now in force for the Redemption of the Land Tax, with Tables for calculating the Terms of Redemption in Money and Stock.*

II. *An Exposition of the Land Tax: its assessment and collection; and Rights and Advantages conferred by the Redemption Acts.* By MARK A. BOURDIN, of the Inland Revenue Office, Somerset House. London: T. Day.

THE above two works will be found extremely useful to those who are anxious to obtain a sufficient knowledge of the Land Tax Acts to enable them to

understand the provisions of the numerous acts which have been passed for the redemption of the Land Tax, and to prevent their falling into the mistakes which, as the decided cases show, are not unfrequent with practitioners who do not seem generally acquainted with the provisions of such acts, especially where the redemption is made at the instance of persons not possessing an absolute interest in the land in respect of which the redemption is made. As Mr. Bourdin observes in the preface to the first of the above works:—

"The advantages secured by the recent measures to the large landed proprietors especially, ought not to escape their notice, for not only are they enabled at once to free their estates from Land Tax at a reduction of six years' purchase, but all the provisions are repealed which permitted their tenants or lessees to redeem out of their own moneys the Land Tax charged on the property leased to them, and which consequently gave such lessees a rent-charge on the property equal to the Land Tax redeemed. The power hitherto possessed by strangers of purchasing the Land Tax upon the land of any proprietor unwilling himself to redeem it, is likewise withdrawn. When the principles of the assessment of the Land Tax is borne in mind, the advantage of redemption by landowners upon so favourable an opportunity as the present must be obvious. Each parish in the kingdom, for instance, is liable for the amount of the quota made perpetual upon it by the 38 Geo. 3., cap. 60; and such quota is annually raised by an equal pound rate assessment upon all the unredeemed property within the parish. Any estate therefore, as it may become improved, is liable to an increased charge of Land Tax."

With respect to the persons entitled at the present time to redeem, Mr. Bourdin says:—

"By the 16 & 17 Vic., c. 117, the right of redemption is restricted to persons having an interest in the property on which the Land Tax is charged, to which description of persons a priority was accorded in the redemption of Land Tax by the act 42 Geo. 3, c. 116. Such persons may be enumerated as follows:—

"1st. Bodies politic and corporate, and feoffees or trustees for charitable or other public purposes, and all persons (except tenants at rack-rent or of Crown lands) in the actual possession of, or immediately entitled to, the rents and profits of any manors, messuages, lands, tenements, or hereditaments whereon any Land Tax shall be charged.

"2ndly. Any one or more coparceners, or joint tenants, &c., for the redemption of the Land Tax on their own shares.

"3rdly. Companies of proprietors of canals,

railways, or other works of public utility, sanctioned by act of Parliament.

"4thly. Committees or curators of lunatics or idiots, tutors and guardians of infants, and all persons having authority to act for infants, married women, or other persons incapable of acting for themselves, for the redemption of any Land Tax which such lunatics, &c., or other incapacitated persons, might have redeemed if not under any incapacity, and all trustees on behalf of their *cestui que trusts* for the redemption of Land Tax on any manors, &c., of which they may be trustees.

"Persons entering into a contract for the redemption of any Land Tax may at their option pay the consideration in money, or satisfy the same by a transfer of stock in the £3 per cents.; and they also have the privilege of making such payment or transfer or instalments (58 Geo. 3, c. 123, secs. 3 and 4), in which case a certain sum will in addition be payable by way of interest, as hereinafter explained.

"The consideration to be given for the redemption of Land Tax is, by the act 16 & 17 Vic., c. 74, declared to be, if by transfer of stock, at the rate of £17 10s. per cent. less than the price named in the 22nd section of the act 42 Geo. 3, c. 116; and if in money, at the rate of £17 10s. per cent. less than the terms set forth in the tables appended to such act. Tables showing the price in stock and money are annexed to this publication."

In the second of the above works, which contains an abstract of the Statutes under which the Land Tax in its present shape is assessed and levied, the author, in speaking of the rights and advantages conferred by the redemption acts, and referring to the provisions of the statutes prior to the 16 & 17 Vic. c. 117, above referred to, and which old acts as to past transactions it is so necessary for the conveyancing lawyer to bear in mind, says:—

"It is necessary to remember the two leading features of the scheme for the redemption of the Land Tax, as set forth in the 38 Geo. 3, c. 60. These were,—

"1st. The redemption of the Land Tax by persons having an interest in the lands on which it was charged.

"2nd. The sale thereof by the Government to strangers, upon the refusal or neglect of the persons interested to redeem it.

"Upon redemption the Land Tax was to merge in the estate.

"Where persons possessing an interest in the lands refused or neglected to redeem the tax within a given time, it was intended to permit strangers to purchase, as a rent-charge, the Land Tax assessed upon the estates of the persons so refusing (38 Geo.

8, c. 60, ss. 68, 69, and 70), the Government undertaking to collect and pay it over to such purchasers (a. 77).

"Such strangers, however, were only to have the benefit of this investment until the Old Sinking Fund had reached the highest accumulation allowed by 26 Geo. 3, at which period the right of redemption, by the owners of the lands charged with such purchased Land Tax, was intended to be revived; whereupon the Government were to repay to such purchasers the consideration given by them for the Land Tax so bought (ss. 92, 93, and 94).

"This latter part of the scheme was not, however, carried out, in consequence of the period allowed by the act for the redemption, *by persons interested*, having been extended from time to time by subsequent acts, until the passing of the 42 Geo. 3, c. 116, when the purchase of Land Tax from Government was placed upon a totally different footing.

"Although this *leasing*, as it were, of part of the Land Tax by the Government was not put into execution, it is essential that the powers given for the purpose should be borne in mind, in order to guard against the error of confounding it with the *sale* of Land Tax by persons who, redeeming under the circumstances presently detailed, had the power of disposing of the same as a *marketable* rent.

"This distinction is the less readily recognised by reason of several of the provisions, framed for regulating the proposed sale of Land Tax *by the Government*, having been rendered applicable to cases of sale of the tax by *private persons*, and though never in operation for the former object, are still in force with respect to the latter.

"As the *quotas* of Land Tax made perpetual upon parishes by the 38 Geo. 3, c. 60, were to be thereafter annually assessed by an equal pound rate upon the unredeemed lands therein, any increase in the value of property in a parish, from the inclosure of commons, the multiplication of buildings, &c., would obviously reduce in the same ratio the poundage rate upon such parish. Unless, therefore, some provision had been made for compensating redemptioners upon such a diminution taking place, no redemption would probably have been effected in parishes where any considerable improvement was at all in prospect; no one, for instance, being likely to redeem a Land Tax of £10, with the chance of its proximate reduction to £8.

"To obviate any delay in redemption from this cause, it was enacted that persons redeeming their Land Tax might require that it should be dealt with in the same manner as the act purposed to treat Land Tax purchased—that is, the charge was to be kept on foot, the person so redeeming to have the power of selling or assigning it, the Government

being pledged to collect it, and pay it over to the persons so becoming entitled thereto.

"The 17th section of the before-mentioned act of the 38 Geo. 3, c. 60, consequently directed that any person desirous of redeeming upon the above understanding should, at the time of entering into his contract, declare his option to be considered in the light of a purchaser, which declaration was to be inserted at the end of the contract in the following words:—'And the said A. B. hath declared his option to be considered on the same footing as a person not interested in the said lands is by the said act considered.'

"Land Tax so redeemed is designated '*Land Tax redeemed, but not exonerated.*' Land Tax redeemed under a contract of this description is continued in assessment, as if it had not been redeemed, it is to be paid by the occupier of the land, and the redemptioner, his executors, administrators, or assigns, are invested with all the rights and powers to receive and recover the full amount of such Land Tax, which the act conferred upon an original purchaser."

The works are, fortunately, small in size and also in price, whilst we are certain the perusal of them must be of service to every practitioner. The tables in the first work for calculating the terms of redemption in money and stock will be especially serviceable in cases of intended redemption.

THE LAW REPORTS.

WE have on several occasions drawn attention to the subject of law reports, and so important do we deem it to the profession that we do not fear to add still more to what has been already stated. Indeed, there are few matters really of more importance to both practitioners and students than the reporting system, both on account of the necessity for perusing what is reported and the money which must be paid to acquire such reports. Besides, there is a practical utility in keeping the subject alive as a grievance of the profession, to which a remedy should be applied, for it is quite impossible for an ordinary practitioner to acquire all the reports, or, if he does disregard the expense, it is quite out of the question that he should read and understand the cases reported, even after establishing the very unsatisfactory fact that he has paid for cases reported six or seven times over, and that most frequently in the very same terms, and by the same reporter. What we wish on this occasion is to call attention to the fact that the newly-established reports, called "*The Common Law and Equity Reports,*" are in danger of being discontinued, the publishers having intimated their intention not to commence a new volume. Under these circumstances it appears that the proprietors of the reports

have quarrelled among themselves, and resolved to bring out two new and distinct sets of reports, which we need hardly observe have little chance of succeeding, and this circumstance alone ought to induce any prudent person to refrain from subscribing to either set, as failure is pretty nearly certain after a very short experience. To be sure, eventually the two may coalesce, or one of them give way so as to leave the field open to the other, but in either case some of the subscribers must suffer. We may mention that these reports are not the only ones that are either discontinued or in abeyance, for many of the "regular" reports are become very irregular in their appearance, and suggest the notion, to say the least, that they have been discontinued. The truth is, that few of the reports are now paying their current expenses, which naturally discourages both publishers and reporters. There has of late been a wonderful falling off in the sale of the reports, and it is no uncommon thing to hear practitioners state that they have given up such and such a series of reports, some for one, and others for another reason, but the chief one being that the reports are too expensive, and contain so many repetitions of cases. The remedy is no doubt the issue (which we hope some day to see) of an authorised series for each court, with the understanding that no other reports will be allowed to be cited in court, and then, provided, of course, the reports are properly done, and are sold at a reasonable price, they will quickly drive the others out of the market. By this means the profession would not have to pay as now for half-a-dozen reports of the same case, and possibly more discretion would be exercised as to the kind of cases reported, and conciseness both in the statement of the facts and the judgment be more aimed at than under the present system, which is a premium on lengthiness, inasmuch as the pay is regulated by the quantity.

Respecting the "Common Law and Equity Reports," the *Law Times*, in a recent number, observed:—

"Messrs. Spottiswoode have announced that it is not their purpose to continue the Common Law and Equity Reports. They have proved a complete failure. It was a wild speculation from the beginning, and the loss must have been very serious. The reason is obvious. They were not wanted. They were introduced to the profession on a false pretence. It was asserted that the regular reports cost so many pounds a-year, which is quite true. This was complained of, and justly so. But then it was asserted to be hard upon the profession to be put to such cost, and that the Spottiswoode project was a novel design to relieve them from the burden, by supplying the same reports at one-fifth of the cost.

This was a deception. The profession already possessed an admirable series of reports, of established reputation, and supplying all its needs. The existence of the *Law Journal* was ignored. Yet the *Law Journal* had already done all that the Spottiswoode Reports promised to do. It was quite as cheap and quite as good. No single reason was, or could be, shown why any lawyer should give up his old and excellent friend and companion, the *Law Journal*, with its fame of more than twenty years' standing, to substitute for it a new series of reports, not one farthing cheaper, and in no respect better, wanting authority and having a reputation to earn.

"And so it has proved. The lawyers were not inclined to abandon the *Law Journal* for a stranger. The end is, that after a few months' sickly existence, during which great loss must have been incurred, the Common Law and Equity Reports have died, and both speculators and subscribers have thrown away their money. Doubtless it will be said, that the failure has arisen from the present unprosperous state of the profession, which has not merely disinclined but disabled the lawyers from buying more books of any kind than are absolutely necessary for their daily guidance. But this explanation, true enough as accounting for the almost entire prostration of legal literature, does not meet the case of the deceased reports. In no circumstances could they have succeeded, because they were not wanted. There was no vacuum for them to supply. The place they proposed to fill was already occupied, to the entire satisfaction of the profession, by the *Law Journal*. They could succeed, therefore, only by ousting the *Law Journal*. Was this probable or possible? Could any single reason be adduced why any practitioner should give up the *Law Journal*, to take in its stead a stranger not superior to it in any respect?

"This incident affords another illustration of a truth which we have more than once sought to convey—that any enterprise, to be successful, must be novel. It must strike out a new path, supply some public want not yet supplied, and create for itself a new constituency. It is always difficult, almost always impossible, to succeed where success can be obtained only by thrusting out another who is in possession. If speculators would but remember this, failure would not be so frequent, and speculation would not have the bad character which belongs to it, and which now makes it to be shunned by all but those who have nothing to lose by it.

"We would, however, take this opportunity to offer a suggestion or two to the proprietors of the reports which have been thus fruitlessly assailed. An opportunity now opens to them to avoid the objections that were made the pretence for rivalry.

"First, for the *regular reports*, of which the complaint was that their total cost is so great. The complaint is just. It is unnecessarily great, and the consequence is a very limited sale. This results from their isolation. Each one is a separate property and speculation. Now we would suggest to the proprietors and reporters, whether it would not be practicable for them to unite their scattered forces, and by an arrangement *inter se*, not difficult to be devised, to bring out the *regular reports* uniformly and in conjunction, as one series, so that the practitioner might have all or any, according to his wants, and making a material reduction in the price of the whole series. We believe that the increased sale that would thus be obtained would amply compensate for the diminished price; and something might be saved by a more compact typography. The *regular reports* would be preferred by all, if they could be had at a reasonable price. A meeting of the proprietors could arrange the plan in an hour, and it should begin with next term.

"And to our old friend, the *Law Journal*, we would suggest the propriety of adopting the one solitary feature in which the Spottiswoode Reports had an advantage—their form. Why should the *Law Journal* adhere to its original shape, when a more convenient one would be a royal octavo, with a separate volume for each class of reports, and selling each class separately, as well as the whole? It is as well to remove objections, if practicable; and we believe the change would be welcomed by all its subscribers."

ABSTRACTS OF TITLE.

Though many writers of ability and eminence have given it as their opinion that the recent statute of 3 & 4 Will. 4, cap. 27, had shortened the period to which a purchaser can require a vendor to carry back his abstract of title, the contrary is too well established to be easily shaken, and the rule now universally adopted by the profession is, that the onus lies upon the vendor of disclosing and proving his title for sixty years preceding the time of purchase. Still, even at this day it is by no means an easy matter for the vendor's solicitor correctly to determine in his own mind at what precise period, and with what particular instrument, he should commence his abstract. Upon the one hand he may be giving a troublesome and an unskilful solicitor the power of raising many difficulties—more imaginary than real—and be thus putting his client to needless expense; or, on the other (by not being actuated by a sufficient degree of candour), be putting one of ordinary ability (using a proper

degree of vigilance) off his guard, by glossing over defects, and making a title appear unexceptionable, which may contain radical defects, which would have been discovered if a more fair and honest narrative of the title had been supplied. This latter is surely the practice of a professional immorality, and cannot be too much discountenanced and condemned.

Upon the rule, even as to the sufficiency of a sixty years' title, many exceptions must be engrafted, showing the necessity for carrying back the title to a more remote period: thus, for example, in the cases of *post-nuptial* settlements, in pursuance of *ante-nuptial* articles; deeds operating as executions of powers of appointments; entails under deeds, or wills; devises of the fee, &c.; the *ante-nuptial* articles; the instrument by which the powers and entail were created; and the will under which the devisee derives his title should be abstracted, to show that the settlement is framed in accordance with the articles; that the powers have been effectually exercised; that the vendor was tenant in tail in possession when he affected to bar the entail; and the devise was of the entire fee simple, and was not made subject to any charge, estate, conditional limitation, or other interest. But, irrespective of these and many kindred considerations, the vendor's solicitor has frequently to exercise his judgment in matters involving complicated points in *morale*, as well as law: he may be able so show *upon the face of the abstract* a good indefeasible title to the property, commencing perhaps with a conveyance more than sixty years old, and referring to no other document, but he may be aware of some point of law involved in the prior title, which would materially alter the case, and render the title doubtful, instead of unexceptionable. *What would be his duty under such circumstances?* We entertain a strong opinion as to the moral duty of a solicitor in such a case, but at the same time are well aware that many do not agree with our conclusion.

Let us look at the case a little closer. An abstract is considered to be a clear and conscientious compendious statement of the vendor's title, delivered to the purchaser's solicitor for his investigation, and is delivered under the assumption that his client has a good title to the subject matter; or, if any objections are taken, that it is in his power to remove them.

If this attempted definition is correct, can we justify the suppression of the knowledge of the doubtful point, when the solicitor himself can rebut the presumption? Granted he may be the only person in the world cognizant of it, still it exists, and at some future period might be taken advantage of to the prejudice of the purchaser, though his advisers have not by the exercise of any amount of vigilance and professional skill the means of detecting it.

Mr. Hayes, in an opinion which he has inserted in his "Introduction to Conveyancing," says: "The sound rule seems to be that the onus lies upon the vendor of proving the title for sixty years, and that the onus lies upon the purchaser of disproving the title beyond that period; the vendor, however, not withholding any means of information." He then advises that the vendor should offer the inspection of the old deeds, but decline to abstract them; but this offer is, it is assumed, advised upon the *presumption of the validity of the title*. We know how seldom, in practice, a solicitor would avail himself of such an offer to scrutinize the deeds themselves; how inconvenient it would be to do so; and how seldom any practical good would arise from it.

There must always be a *good root of title* (the so-called "title" would otherwise be a mere shadow). When we speak of a sixty years' title, this is always implied. There can be no doubt as to the duty of a solicitor to produce the whole evidence of title in his possession, when called upon to do so. But are there no cases in which it is his duty to *volunteer* evidence? We have heretofore been speaking of doubtful points, but let us go farther, and put our case upon the ground of there being a *radical defect* known to the solicitor, and use this as a test of the correctness of our position: he furnishes the purchaser's solicitor with an abstract which, upon the face of it, discloses a good title, for the last sixty years, commencing with the conveyance from a person affecting to have the fee, but who, upon reference being accidentally made to a settlement executed before his father's marriage, when the estate was re-settled in the usual way, it appears as only tenant for life. Here is a radically defective title, as the statute of limitations would not begin to run against the remainderman until after the death of the tenant for life. We may put it that the title has been accepted, and the purchaser has offered to complete, would it not be the grossest piece of dishonesty for the vendor's solicitor to withhold this fact? We know that the whole profession would reply to this question in the affirmative, and we think that that answer will solve the prior and more difficult question. It is doubtless one of the same family, though of a different degree, and the means of getting over the difficulty is, probably, one of degree also; and the practical conclusion to which our mind has arrived is this: that where the defect is a radical one, it should be communicated to the purchaser's solicitor that a good title cannot be made, though not stating the specific defect, unless pressed to do so; and as to the point to which we have, more specifically, drawn attention, we think, unquestionably, that the abstract should be carried back to a sufficiently remote period to disclose the

precise question; so that the advisers of the purchasers could deal with and decide it for themselves.

But to conclude. We should surely never lose sight of the fact, that we are the members of an honourable profession—of a very numerous family—having frequently very critical, and sometimes unpleasant, duties to perform, the performance of which can only be rendered more agreeable to ourselves—and the result more profitable to our clients—by extending to each other candour, and reposing in each other confidence. Crudeness gains us nothing, and but for it the bye word "*attorneyism*" would be unheard of—in short, troublesome men often proclaim timidity and want of skill, and should be avoided, without losing sight of our legal axiom—

"*Vigilantibus non dormientibus jura subveniant.*"

There are many interesting and important points which, upon some future occasion, it will be useful to discuss, under the head of "Abstracts of Title."

B. H. S.

FIRE ASSURANCES—PARTIAL LOSSES— CONDITIONS OF AVERAGE.

WITH reference to the fire at an eminent ship-builders, where there were several insurances effected with different offices, and none of them, of course, covering the amount of loss, the *Times* newspaper has called attention to the operation of the average clauses inserted in such cases, and in cases of that nature the subject is one of some importance to solicitors:—

"The late loss by fire at Messrs. Scott Russell and Co.'s shipbuilding-yard, Mill-wall, has just been finally determined, after a protracted investigation by the several insurance offices interested, for £25,000, the policies being subject to the conditions of average. These conditions are of great importance, but are not always sufficiently understood. Their effect is that, in the event of partial loss, the uninsured sum of the total value covered by the policies bears its relative proportion to the sum insured. Thus, if the total value of the property should amount, at the time of a fire, to £200,000, while only £150,000 is insured, and a loss of £100,000 should arise, the sum to be paid by the insurance offices would be three-fourths of the loss, or £75,000 only. The following are conditions of average referred to:—

"*ENGLISH.*—It is hereby declared and agreed that, in case the property belonging to the insured, in all the buildings, places or limits herein described, shall, at the breaking out of any fire or fires, be collectively of greater value than the sum insured, then the company shall pay or make good to the

assured such a proportion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid at the time when such fire or fires shall first happen.

"But it is at the same time declared and agreed that, if the within-mentioned assured shall, at the time of any fire, be insured in this or any other office on any specific parcel of goods, or on goods in any specific building or buildings, place or places, included in the terms of this insurance, this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specified insurance or insurances, which said excess is declared to be under the protection of the policy, and subject to average as aforesaid."

"FRENCH.—If at the time of a fire the value of the objects covered by the policy is found to exceed the sum total of the insurance, the assured is considered as having remained his own insurer for that excess, and he is to bear in that character his proportion of the loss."

COSTS OF PROSECUTIONS.

We are indebted to the *Law Times* for the following:—After a slumber of five years, the Expenses of Prosecutions Act is about to be brought into operation. At this moment of writing, we are necessarily ignorant of what is doing in other parts of the country; but we have no doubt that a similar course has been pursued elsewhere. The arrangements before us are proposed to be made for the county of Devon; but as the regulations there proposed will, doubtless, be adopted generally throughout the country, we hasten to submit them to our readers, with such objections as may occur to us—in hope that a prompt remonstrance may procure a revision of those portions of it which appear not to be calculated to advance the ends of justice.

The following is the scale proposed to be adopted for the costs of prosecutions at sessions. We copy the blank form:—

SCALE. SESSIONS.

..... shire.

..... Sessions, 185

Regina v.

For [state the specific character of the offence]

Value of Property

No. in calendar.....

Prosecutor's Costs.

Expenses before committing magistrate as per his certificate annexed (1)

Retainer and instructions for indictment

and attending 0 6 8

Copies subpoena (2) 6d. each

Service when necessary (2).....

Drawing and fair copy brief: 0 13 4

Paid Mr. and clerk..... 1 3 6

Paid clerk of the peace court fees, &c., as

per particulars annexed

Attending court, conducting case days

at (3)

Paid witnesses—(4)

(1) The certificate must furnish particulars, or it will not be allowed.

(2) This charge only allowed when the witness has not been under recognizance to appear. Each service third class railway fare when necessary to travel. If no railway or only part of the journey can be performed by railway, 6d. a mile going, but not returning, in addition to railway fare for the part so travelled.

(3) Where resident 19s. 4d. a day, nonresident one guinea a day, irrespective of the number of cases.

(4) 2s. to 3s. per diem to police, labourers, women, and children where resident; 3s. to 5s. per diem for police, mechanics and others not professional where nonresident; £1 1s. to professional men. Travelling police, government fare; labourers, &c., and others not professional, second class railway fare; professional men, first class. Mileage where necessary, and above four miles from place of residence, 6d. a mile going, but not returning. To be charged in one indictment only.

No allowances for counsel or attorney where the prisoner admits his guilt before committing magistrate, or for counsel where bill is ignored. Allowances to attorneys will not in any case be granted except at such sessions where the ordinary practice is to give them, but, with this exception, this scale is to be everywhere adopted.

CAUTION.—The taxing officer has instructions to bring before the court any parties making false charges for witnesses, loss of time, travelling distances, &c., &c.,

Prosecutor's attorney—

Let us at once say that the greater portion of these arrangements are entitled to commendation.

It is, we understand, designed that counsel and Attorney shall be engaged in every prosecution, nor is the allowance of fees to be complained of; on the contrary, it is a very great improvement upon the previous scale, which did not make to the Attorney any allowance for his attendance at the trial. By the new scale, the Attorney is to be allowed 13. 4d. per day, if resident, £1 1s. per day, if nonresident, for such attendance; and this is stated to be "irrespective of the number of cases;" an ambiguous expression, by-the-bye. but which we

take to mean that it is to be allowed in the particular case, irrespective of the number of cases the Attorney may have, and therefore to be a cumulative fee. This is a tardy act of justice to the profession, and the provision for a prosecution in all cases is now rendered practicable by the Summary Jurisdiction Act, which removes from sessions the trifling cases that hitherto have been the real obstacle to the adoption of such a course. It will be observed that, although drawing briefs is thus nominally reduced from £1 1s. to 13s. 4d., this fee, is, in fact compensated by the allowance of 6s. 8d. for instructions. But there is a defect in this to which we ask the attention of the Secretary of State. No allowance is made for copies of the examinations. These are necessary to the proper drawing of a prosecution brief, and it would be very unjust to make the Attorney pay for the copies out of his own pocket, unless, indeed, magistrates' clerks are to be required to supply them to the prosecutor's Attorney without charge.

Another objection is to the provision that refuses counsel's fee where the bill is ignored. This cannot fail to produce the greatest inconvenience and materially to impede the administration of justice. The practical effect of it must be to prevent the briefs being delivered to counsel until the bill is found; and it continually happens that the prisoner is tried immediately on the finding of the bill, so that no time would then be permitted to him to read the brief and get up the case. In order to do justice to a prosecution the brief should always be delivered on the day before the trial, so that counsel may have the quiet of an evening in his lodgings to look carefully into it. This preparation would be rendered impossible by the proposed plan of refusing the fee where the bill is ignored, for the brief could in no case be delivered until the bill is found. And after all, for what is this inconvenience to be incurred? How many guineas would be saved by it at any sessions? The attorney is always to have his fees for preparing the brief and attending; the sole saving will be the paltry guinea to counsel. There may be half a dozen such cases at a sessions, and for this paltry saving all the prosecutions are to be conducted imperfectly. Twenty are to suffer, lest one should cost an extra guinea.

DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' SOCIETY.

Wednesday, 12th September, 1855.

"Is a landlord who forcibly enters on premises, the tenant of which holds over after the tenancy has been duly determined, liable in a civil action at the suit of the tenant?"

In order to arrive at a correct conclusion on this question it will be necessary to premise that a tenant holding over after the due determination of his tenancy becomes a tenant by sufferance, such tenancy being defined by Blackstone to be one who comes in by right, and holds over in wrong, and that the remedy (if any) of such tenant for a forcible entry by his landlord would be either for the trespass to the person (if any such were committed); or, secondly, for treble damages for the trespass to the estate under stat. 8 Hen. 6, cap. 9, sec. 6.

It was contended in the affirmative of the first proposition, that, admitting as established by the cases of *Taunton v. Costar* (7 T. R. 431), and *Turner v. Meymott* (1 Bing. 158), that no action lies at common law for the trespass to the land, and also as decided by the same and other cases, that no action for trespass *quare clausum fregit* lies at the suit of the tenant against the landlord for a forcible entry after the expiration of the tenant's term on the ground that the tenant having no title to the possession against the landlord, can have no right of action against him for entering on his own land even with force, yet, as since the statutes of forcible entry, a landlord could not acquire by any such entry a lawful title so as to sustain the allegation of lawfully possessed in a plea of justification, and thereby acquire a right to expel any person there found; citing *Hilary v. Gay* (6 C. & P. 284), where Lord Lyndhurst, C. B. held, at nisi prius, that the defendant (the landlord) was not justified in entering on premises the tenancy of which was determined and expelling the plaintiff's family therefrom and which view was further confirmed by the Court of Common Pleas, in the case of *Newton v. Harland* (1 M. & G. 144), where it was held (*dissentiente* Colman, J.), that where a tenant remains in possession after the expiration of his term, a landlord is not justified in expelling him by force in order to regain possession, and that possession so acquired is not sufficient to vest the possession in the landlord with relation to the end of the term.

In the negative of the first proposition it was contended that as a party having a right to land acquires by entry the lawful possession of it (*Butcher v. Butcher*, 7 B. & C. 398), and the tenant after such entry becoming a trespasser or wrongdoer, the landlord would be justified in expelling him (*Taylor v. Cole*, 3 T. R. 292), where it was held, that in an action of trespass for breaking, entering and expelling, a plea of justification answered the whole declaration, and that if the plaintiff's case was that the expulsion was a violence, which made the defendant a trespasser *ab initio* (*vide Six Carpenters Case*, 1 S. L. C. and notes), he should new assign, the words *vi et armis* being a mere formal allegation

implying that some kind of force was used to obtain the end desired, and do not of themselves imply undue force (*Harvey v. Bridges*, 14 M. & W. 437; *Wright v. Burroughes*, 8 C. B. 699; *Davison v. Wilson*, 11 Q. B. 899). *Burling v. Read* (11 Q. B. 904) was also cited as a strong authority in the negative, being a case of trespass for pulling down the workshop of the plaintiff, he being therein, and for an assault at the trial, Pollock, C. B., told the jury that if the defendants had title to the workshop they were entitled to take immediate possession, and, when in possession, to pull it down, and that it was immaterial whether the plaintiff was in the house or not, and on the motion for a new trial, on the ground of misdirection, Campbell, C. J., observed "the plaintiff is a trespasser; what right can he have to prevent the owner of the soil from pulling down the house?"

It should also be observed that the ruling of the Court of Common Pleas in *Newton v. Harland* (the only authority in the affirmative) was strongly disapproved of by Baron Alderson (who tried the case at Nisi Prius); also by Barons Parke, Platt, and Alderson in *Harvey v. Bridges*; by Wilde, C. J., in *Wright v. Burroughes*; and was doubted by Cresswell, J., in *Davis v. Burrell*, 10 C. B. 825.

In the negative of the second proposition it was argued that as the plaintiff's interest in the premises must be stated in an indictment under the statutes (*Rex v. Wilson*, 8 T. R. 360), it would appear that where a tenant wrongfully holds over after the expiration of his tenancy, and is forcibly dispossessed, the case would not be within them, otherwise the justices would be compelled to award restitution to the tenant, although it was admitted that his possession would not support trespass *quare clausum freigit* against his landlord. It was also contended that as the plaintiff was a wrongdoer the maxim, *nullus commodum capere potest de injuria sua propria* applied, and that, therefore, he would not be allowed in a court of justice to obtain an advantage from his own wrongful act. The majority of the meeting were in favour of the negative.

Wednesday, September 26, 1855.

"A trustee for sale of real estate for the benefit of creditors obtains the consent of the majority of such creditors to a purchase by himself. Can the purchase be set aside by the dissentient, minority?"

To prevent the conflict of duty and interest which would arise were a person clothed with a fiduciary character allowed to become the purchaser of property of which, by virtue of his trust, he is the vendor, the rule of equity declares that though the full value of the property has been given, and the sale made with all fairness and publicity, yet, being

a purchase by a trustee from himself, it shall not stand, or, to use the words of Sir P. Arden, M. R., in *Cambell v. Walker* (5 Ves. 677): "A trustee purchasing his trust property is liable to have the purchase set aside if in any reasonable time the cestui que trust chooses to say he is not satisfied. The trustee purchases subject to the equity that the cestui que trust may at his option have the estate resold."

Applying these principles to the question in the moot point, and looking at the nature of the cestui que trust's interests, which, being several, and not in the nature of a public trust or act, so as to render the decision of the majority binding on the minority, the conclusion we should arrive at would be in the affirmative. But in *Whelpdale v. Cookson* (1 Ves. sen. 8), Lord Hardwicke, in setting aside a purchase made by one of a body of trustees for sale for the benefit of creditors, observed, "that if the majority of the creditors agreed to allow the sale, he should not be afraid to make the precedent." This dicta was much questioned, and particularly on several occasions by Lord Eldon, who, in *ex parte Lacy* (8 Ves. 625), thus expressed himself: "If a trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others, and he had considerable doubt whether the majority could in that article bind the minority," and was at length virtually overruled by the case of *ex parte Beaumont* (1 Mont. and Ayr. 304), where, on a petition by the assignee to be allowed to bid at a sale of the bankrupt's property, the court dismissed the petition on the ground that of all the creditors who had proved under the bankruptcy only about one-half had attended the meeting at which the consent to the petition was obtained, and of the inability of those so present and consenting, to bind the others. The meeting decided unanimously in the affirmative.

THOMAS HORTON, Hon. Sec.

PUBLISHING NAMES OF PARTIES GIVING BILLS OF SALES.—We have before alluded to the reprehensible practice resorted to by some parties of publishing lists of the names of parties giving bills of sales (vol. 1. p. 386), and we may now state that this circumstance was greatly insisted on before the committee on the Bills of Exchange Summary Procedure bill, and the committee of the Incorporated Law Society, in their last report, thus refer to it:—"Connected with the proposed registration of dishonoured bills may be mentioned an abuse which has occurred in regard to the registration of bills of sale, and which, no doubt, would have prevailed if unpaid bills and notes were registered, viz., the publication of the names of all the persons granting such bills of sale."

RECENT STATUTES, 18 & 19 VICTORIA.

(Continued from p. 127).

JURISDICTION OF CINQUE PORTS.

CAP. XLVIII.—The peculiar jurisdiction of the Lord Warden of the Cinque Ports, both as to the holding of certain courts of law and equity, and the execution of writs, whether of *capias* on mesne process, or of *ca. sa.* or *fi. fa.* on judgments, has been at last abrogated, and with it has gone that portion of the jurisdiction which appertained to the insolvency cases of prisoners in Dover Castle. Indeed, it would seem that Dover Castle will no longer be used as a place of confinement for prisoners, and thus many persons who were in the habit of selecting this locality as the most pleasant for their imprisonment, with a view to petition the Insolvent Debtors' Court, will be deprived of what was a luxury to those who could afford to pay for it. Maidstone Gaol will be the prison used in lieu of Dover Castle. As we have said, the object of the act is to abolish the jurisdiction of the Lord Warden over civil suits, and also to sever from the Cinque Ports certain parishes, which at present constitute members or liberties thereof. The 1st section enacts, that from the 30th September, 1855, *the authority of the Lord Warden of the Cinque Ports and Constable of Dover Castle, relating to the administration of justice in civil proceedings, at law or in equity, or the execution of judgments, writs and process therein, shall cease*, except as to writs of *fi. facias* received by him before that date. By the 2nd section, after the above-mentioned date, civil proceedings are to be directed, executed, and carried on in the Cinque Ports, the two ancient towns of Winchelsea and Rye, and their liberties, in the same manner as in other places in England, and the sheriff and other ministers of counties are to have the same powers within the Cinque Ports, &c., as in other parts of their counties. The 3rd section enacts, that on petition of the inhabitants of parishes within the Thanet division of Dover—viz., the parishes of St. John the Baptist (called Margate), St. Peter the Apostle, Birchington, Acol, otherwise the Ville of Wood, Beakbourne, and Grange, otherwise Grench, her Majesty may order such parishes, or one or more of them, to be deemed part of the county of Kent; and the county justices, who are then to have jurisdiction over them, are empowered by the next section to levy county rates upon them. By the 5th section certain acts of Parliament are to be repealed, so far as they relate to these parishes, after the order for their severance or a charter for their incorporation; and from that time neither the court of sessions for Dover (except as to persons then committed or bailed for trial at such court, sec. 7), nor any of the

justices thereof, are to exercise any jurisdiction over them. The 6th section continues the liability of such parishes for monies which have been borrowed on the security of rates raised within them. The 8th section provides for compensation in the case of offices abolished. By the 9th section, persons in the custody of the Lord Warden on the said 30th Sept., by virtue of any authority abolished by the act, are to be removed to the common gaol of the county in which they are arrested. The 10th section saves the rights of the Lord Warden and other officers of the Cinque Ports under any act relating to the adjustment of salvage, or of the Court of Admiralty of the Cinque Ports, or the rights of the Lord Warden, in respect of flotsam, jetsam, and lagan.

RELIGIOUS WORSHIP LIBERTY ACT.

CAP. LXXXVI.—This is an act to amend the laws relating to assemblies for religious worship, and its object is to legalise assemblies of divine service according to the rules of the Church of England in (chiefly) private dwelling-houses, or other places not certified, and it has been promoted by many of the Established Church, as also, of course, supported by the dissenting bodies. It, in effect, legalises the performance of divine service in the form prescribed by the Church of England in the following cases: 1st, a congregation conducted within the parish by its incumbent or curate; 2nd, any congregation for religious worship held in a private dwelling-house, or the premises belonging thereto; 3rd, any congregation meeting occasionally in any building not usually appropriated to the purposes of religious worship. Its operation on the law will be better understood from a recital of the previous statutes, which it purports to modify or affect. By the 1 Will. and Mary, sess. 1, c. 18, intituled "An act for exempting their Majesties' Protestant subjects dissenting from the Church of England from the penalties of certain laws," it is enacted that no congregation or assembly for religious worship shall be permitted or allowed until the place of such meeting shall be certified and registered or recorded as described in such act: and by an act passed in the 52nd of George 3, chapter 155, intituled "An act to repeal certain acts, and to amend other acts, relating to religious worship and assemblies, and persons teaching or preaching therein," it is enacted that no congregation or assembly for religious worship of Protestants (at which there shall be present more than twenty persons, besides the immediate family and servants of the person in whose house or upon whose premises such meeting, congregation, or assembly shall be had), shall be permitted or allowed unless the place of such meeting is certified as described in such act, and that every person who

shall knowingly permit or suffer any such congregation or assembly as aforesaid to meet in any place occupied by him, until the same shall have been so certified, shall forfeit for every time any such congregation or assembly shall meet a sum not exceeding twenty-pounds nor less than twenty shillings, at the discretion of the justices who shall convict for such offence. The new act provides as follows:—

1. *No prosecution to be maintainable for assembling for religious worship in a place of meeting not certified.*—From and after the passing of this act, nothing contained in the above-mentioned acts, or in an act passed in the fifteenth and sixteenth years of the reign of her Majesty, chapter thirty-six, shall apply to the congregations or assemblies hereinafter mentioned or any of them: that is to say, (1) To any congregation or assembly for religious worship held in any parish or any ecclesiastical district, and conducted by the incumbent, or in case the incumbent is not resident, by the curate of such parish or district, or by any person authorised by them respectively: (2) To any congregation or assembly for religious worship meeting in a private dwelling-house or on the premises belonging thereto: (3) To any congregation or assembly for religious worship meeting occasionally in any building or buildings not usually appropriated to purposes of religious worship: And no person permitting any such congregation to meet as herein mentioned in any place occupied by him shall be liable to any penalty for so doing.

2. *Construction of certain parts of 2 & 3 Will 4, c. 115, and 9 & 10 Vict. c. 59, as to places of worship of Roman Catholics and Jews.*—So much of an act passed in the second and third years of King Will. 4, chapter 115, as enacts that her Majesty's subjects professing the Roman Catholic religion, in respect to their places for religious worship, shall be subject to the same laws as the protestant dissenters are subject to, and so much of an act passed in the ninth and tenth year of her present Majesty, chapter 59, as enacts that her Majesty's subjects professing the Jewish religion, in respect to their places for religious worship, shall be subject to the same laws as protestant dissenters are subject to, shall be respectively read as applicable to the laws to which protestant dissenters in England are subject for the time being after the passing of this act.

PREVENTION OF DISEASES.

CAP. CXVI.—This act, entitled an Act for the better prevention of Diseases, recites that the provisions of the "Nuisances Removal and Diseases Prevention Act, 1848," amended by the act of 1849, in so far as the same relate to the prevention or mitigation of epidemic, endemic, or contagious

diseases are defective, and that it is expedient to substitute other provisions more effectual in that behalf. The enforcement of the provisions of the act is given, by sec. 2, to the authorities acting under the Nuisances Act, and the expenses are to be paid in like manner. The Privy Council is empowered by secs. 5 & 6 to issue orders that the provisions of the act shall be put in force, and to issue regulations for carrying out such provisions, which are to embrace "the speedy interment of the dead, house to house visitation, the dispensing of medicines, guarding against the spread of disease, and affording to persons afflicted by or threatened with such epidemic, endemic or contagious diseases, such medical aid and such accommodation as may be required. These regulations are by sec. 7, to be published in the *Gazette*, and the local authority is then (ss. 8 & 9) to see to the execution of them, and may direct prosecutions for their violation. The orders so made are (s. 10) to be laid before Parliament. Where medical officers are required by General Boards of Health to attend the sick on board vessels, they are to be entitled to reasonable costs, according to the usual rate of charge for attending patients of the same class: (sec. 12). The provisions of the Nuisances Act are to apply to this act with regard to the service of notices, the proofs of orders or resolutions of a local authority, and the recovery of penalties.

LUNATIC ASYLUM AMENDMENT ACT.

CAP. CV.—This is entitled "An act to amend the Lunatic Asylums Act, 1853, and acts passed in the 9th and 17th years of Victoria, for the regulation of the care and treatment of Lunatics." The act referred to as the 9 Vic. is the 8 & 9 Vic. c. 100, and the other is the 16 & 17 Vic. c. 96. It enacts (sec. 1), that any single county or borough may unite with the subscribers to a hospital; that (sec. 2) the proportion of expenses to be paid between any county or borough may be fixed with reference to accommodation likely to be required, but if not so fixed the contributions are (secs. 3, 4), to be according to the relative populations for the time being, as ascertained by the census. By sec. 5, where an union is dissolved a new house is to be built. The provisions of the former acts are (sec. 6) to apply to councils of boroughs which have taken upon themselves the execution of the Lunatics Act, 1853. By sec. 7, places becoming boroughs after the commencement of the last-mentioned act are to be deemed boroughs annexed to the counties in which they are situate. By sec. 8, the powers given by sec. 77 of the Lunatics Asylums Act, 1853, to any two of the visitors, being justices, to order the removal of a pauper-lunatic, are extended so as to authorise them to order

the removal of any pauper-lunatic chargeable to any parish or union within any county or borough. The provisions of this section can hardly be understood except when stated in full. It enacts that the power given by section seventy-seven of the Lunatics Asylum Act, 1853, to any two of the visitors of any asylum, being justices, to order any pauper lunatic chargeable to any parish or union within the county or borough, or any county or borough to which such asylum wholly or in part belongs, or to any such county, and who may be confined in any other asylum, or in any registered hospital or licensed house, to be removed to such first-mentioned asylum, shall be extended so as to authorise such visitors to order any pauper-lunatic chargeable to any parish or union within any county or borough, or to any county for the reception of the pauper lunatics whereof into such first-mentioned asylum there is a subsisting contract, and who may be confined as aforesaid, to be removed to any such first-mentioned asylum, and also to order any such pauper-lunatic as hereinbefore-mentioned to be removed from such first-mentioned asylum to any asylum, registered hospital, or licensed house, subject nevertheless to the restriction contained in section seventy-eight of the Lunatics Asylum Act, 1853. By sec. 9, the powers of commissioners and visitors, under the acts of 1853, and of 8 & 9 and 16 & 17 Vic., are to continue to be applicable to a house which has been licensed after the expiration of the license while any patients are therein. By sec. 10, contracts under sec. 42 of the act, 1853, may be renewed from time to time. Further provision is made by sec. 11 for the burial of pauper-lunatics, and for that purpose the visitors may (sec. 12) enter into agreement with any cemetery company or burial board, and the committee of visitors may (sec. 13) convey land for the burial-ground of lunatics dying in the asylum. By sec. 14, when the settlement of a pauper-lunatic cannot be ascertained, and he is found in a borough which does not contribute to the county expenditure, he is to be chargeable to the borough. As this provision is one of some importance, we give its recital and enactment entire:—"And whereas doubts are entertained as to the chargeability of pauper-lunatics found in boroughs whose settlements cannot be ascertained, and it is expedient to remove such doubts: section three of the act of the session holden in the twelfth and thirteenth years of her Majesty, chapter eighty-two, shall be repealed; and where any pauper-lunatic is not settled in the parish by which or at the instance of some officer or officiating clergyman of which he is sent to an asylum, registered hospital, or licensed house, and it cannot be ascertained in what parish such pauper-lunatic is

settled, and such lunatic was found in a borough having a separate court of quarter sessions of the peace, and which is not liable under the act of the session holden in the fifth and sixth years of King William the Fourth, chapter seventy-six, section one hundred and seventeen, to the payment of a proportion of the sums expended out of the county rate, such lunatic may be adjudged to be chargeable to such borough by any two justices of such borough; and it shall not be lawful for any justices to adjudge such lunatic to be chargeable to any county, nor to make any order upon the treasurer of any county for the payment of any expenses whatsoever incurred or to be incurred in respect of the said lunatic; and all the provisions in the Lunatic Asylums Act, 1853, as to the mode of determining that a pauper-lunatic is chargeable to a county, and as to the order to be made for the maintenance of such pauper lunatic, shall extend and be applied to such borough, as fully and effectually, to all intents and purposes, as if all the said provisions were repeated and re-enacted in this act, and made applicable to such borough, in the same manner in all respects as though for the purposes of this provision such borough were a separate and distinct county." By sec. 15, seals of commissioners, visitors, and justices are dispensed with; signature is to suffice. By sec. 16, personal examination of patient is not to be required, and so much of sec. 6 of 16 & 17 Vic. c. 96, as requires personal examination of patients is repealed. By sec. 17, a patient may be sent to any place of health on the consent of the committee of management. By the 18th section, the detention of lunatics after the expiration or revocation of the license, is to be a misdemeanor. By sec. 19, the present act is to be read and construed with the amended acts as one act.

MILITIA ACTS.

CAPS. C. & CVI.—The first of these acts suspends the making of lists and ballots until the 1st Oct, 1856, unless directed by order in council. The second amends the law concerning the qualification of officers of the militia. A colonel is to possess landed estate or be heir-apparent to an estate of equal value to the amount of £600 per annum; a lieutenant-colonel, £400. A major, £300; and a captain, £200. But the possession of income from personal estate is to be deemed equivalent to a like income from land.

ARTICLED CLERKS—CLASSICAL, &c., EXAMINATION.—The Incorporated Law Society are about to propose to the judges that *future* articulated clerks shall be examined in English history, geography, Latin, French, arithmetic, and book-keeping.

THE BANKRUPTCY LAW.

(Continued from p. 46).

Adjudication annulled.—If the bankrupt succeeds in showing that there is no proper petitioning creditor's debt, or no act of bankruptcy, or that he is not a trader within the meaning of the bankruptcy laws, and no other creditor's debt, trading, and act of bankruptcy sufficient to support the adjudication, or such of the last mentioned matters as are requisite to support such adjudication in lieu of the petitioning creditors' debt, trading, and act of bankruptcy, or any or either of such matters which shall be deemed insufficient in that behalf (see sec. 104, set out *ante*, 44) as the case may be, be proved to the satisfaction of the court, the court (commissioner) will thereupon make an order to annul such adjudication in the form given by the act, and upon such order being made the adjudication is for all purposes considered to be annulled.

Form of order annulling adjudication.—The following is the form of order annulling an adjudication, given in the schedule to the Consolidation Act:—

THE BANKRUPT LAW CONSOLIDATION ACT, 1849.

Order annulling adjudication.

Court of Bankruptcy, Basinghall Street, London
(or at in the county of)
day of A. D.

In the matter of

Upon reading the proceedings in the above matter, and upon hearing [the evidence now adduced, if the case be so, and] what was alleged by and being satisfied that the petitioning creditor's debt, trading, and act of bankruptcy [or specify the particular matter deemed insufficient, as the case may require], upon which the adjudication of bankruptcy made against the said on the day of was grounded, were and are [or was and is] insufficient to support such adjudication, and no other debt, trading, or act of bankruptcy [or specify the particular matter requisite in lieu of that deemed insufficient as the case may require,] sufficient to support such adjudication being proved, I do order that the adjudication of bankruptcy made against the said on the said day of be annulled, and the same is hereby annulled accordingly.

A. B. Commissioner.

Alleged bankrupt about to quit England or to remove goods.—We should have drawn attention before to the provisions of sec. 99 of the Consolidation Act, by which in case a trader against whom a petition has been filed is about to quit England, or to remove or conceal his goods, with intention to defraud his creditors, may be arrested and his goods seized. The section is as follows:—"That whenever any

petition for adjudication of bankruptcy shall have been filed against any person, and it shall be proved to the satisfaction of the court that there is a probable cause for believing that such person is about to quit England, or to remove or conceal any of his goods or chattels, with intent to defraud his creditors, unless he be forthwith apprehended it shall be lawful for the court to issue a warrant, directed to a messenger of the court and his assistants, or to such person or persons as the court shall think fit, whereby such messenger and his assistants, or other person or persons, shall have authority to arrest the person against whom such petition shall have been filed, and also to seize his books, papers, monies, securities for monies, goods and chattels, wheresoever he or they may be found, and him and them safely keep until the expiration of the time allowed for adjudication on such petition, or until such person shall be adjudged bankrupt under such petition, and be thereon dealt with according to this act: provided always, that any person arrested upon any such warrant, or any person whose books, papers, monies, securities for monies, goods or chattels, have been seized under any such warrant, may apply, at any time after such arrest or seizure, to the court, for an order or rule on the petitioning creditor to shew cause why the person arrested should not be discharged out of custody, or why his books, papers, monies, securities for monies, goods and chattels, should not be delivered up to him; and it shall be lawful for such court to make absolute or discharge such order or rule."

Arrest under this section is to be only until adjudication or until the expiration of the time for adjudication. Under sect. 119, he may be arrested upon the same grounds at any time, and brought before the court to be examined: but there seems no power to detain him, so that he may be forthcoming at a subsequent time. One mode of effecting this object would be by holding him to bail if there was *prima facie* evidence of any of the offences made indictable under this act having been committed. It would appear that any departure from England would suffice, as the principle governing the right to arrest under 1 & 2 Vic. c. 110, does not apply. There the object is to have the debtor at the time of final judgment; here it is that the bankrupt may be examined when necessary. There must be the intent to defraud his creditors, which would probably be inferred from any intent to avoid examination. The arrest or seizure is only until the time for petitioning has expired, or the trader has been declared a bankrupt (see after adjudication, sec. 119, *post*; also 14 & 15 Vic. c. 52, called the Absconding Debtors Arrest Act, referred to 1 Law Chron. p. 8).

Advertising adjudication.—If no notice to dispute

the adjudication be given, or, one having been given, no good cause for annulling the adjudication is shown, the adjudication is advertised in the *London Gazette*, and thereby the court appoints two public sittings of the court for the bankrupt to surrender and conform, the last of which sittings must be on a day not less than thirty days, and not exceeding sixty days, from such advertisement, and must be the day limited for such surrender. If a bankrupt does not intend to dispute the adjudication he frequently consents to the adjudication being at once advertised. This consent should be testified by writing under his hand (sec. 104; *ante*, p. 44)

There are various provisions of the Bankruptcy Act relating to the grant of search warrants, summoning bankrupt and other persons, the protection and examination of the bankrupt and his wife, and persons suspected to have any of the bankrupts property, letters addressed to the bankrupt being ordered to be delivered to the assignees, and the summoning debtors to the estate, which it will be convenient to notice here, before proceeding to notice the ordinary matters transacted at the two public meetings.

Absconding Debtors Arrest Act.—There is also power under the 14 & 15 Vic. c. 52, for a commissioner, &c., to order an arrest of an absconding debtor, but this is rather prior to, than consequent on, adjudication (see short statement in vol. 1, p. 8).

Search warrant for goods in third party's house.—By sec. 106, of the Consolidation Act, "in all cases where it shall be made to appear to the satisfaction of the court that there is reason to suspect and believe that any property of any bankrupt is concealed in any house or other place not belonging to such bankrupt, the court may grant a search warrant to the messenger and his assistants, or other person appointed by the court, and it shall be lawful for such messenger and his assistants, or other person, to execute such warrant according to the tenor thereof; and such messenger and his assistants, or other person, shall be entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen or concealed; and every such search warrant shall be in the form contained in schedule V. to this act annexed, or to the like effect.

Form of search warrant for goods in the house of a third party.—The following is the form of the warrant mentioned in the above section of the act:—

THE BANKRUPT LAW CONSOLIDATION ACT, 1849.

Search Warrant.

day of A.D.

Whereas by evidence duly taken upon oath it hath been made to appear to the satisfaction of me the under-

signed commissioner of the Court of Bankruptcy, acting in the prosecution of a petition for adjudication of bankruptcy filed and now in prosecution against A. B. of in the county of bearing date the day of and under which the said A. B. has been adjudged bankrupt, that there is reason to suspect and believe that property of the said A. B. is concealed in the house [or other place, describing it, as the case may be,] of one C. D. of in the county of such house not belonging to the said bankrupt: These are therefore, by virtue of the "Bankrupt Law Consolidation Act, 1849," to authorise and require you, with necessary and proper assistants, to enter, in the daytime, into the house [or other place, describing it, as the case may be,] of the said C. D., situate at aforesaid, and there diligently to search for the said property, and if any property of the said bankrupt shall be there found by you on such search, that you seize the same, to be disposed of and dealt with according to the provisions of the said act.

Given under my hand and the seal of the court, at the Court of Bankruptcy, London [or at the Court of Bankruptcy for the district at in the county of.] this

day of in the year of our Lord one thousand eight hundred and

A. B. (L.S.) Commissioner.

To my messenger.

and his assistants.

[If there be reason to suspect that the bankrupt and his property are concealed, alter the warrant accordingly].

The above warrant must be executed within the district of the court, and in the day time; no other house than that specified can be entered.

Action against messenger.—We have given sec. 107, as to actions against the messenger, &c., acting under the above warrant, in vol. 1, p. 120, where some cases are referred to.

Action against petitioning creditor in respect of above warrant.—The legislature has exempted the messenger acting under the above warrant from liability by the 107th sec. (vol. 1, p. 120), and throws the responsibility, if the warrant is wrong, on the petitioning creditor; "for the petitioning creditor having obtained the warrant, and given it to the messenger, may properly be taken to have intended the warrant to be executed, whether wrong or not, and ought to be made responsible rather than the ministerial officer acting in pursuance of his authority" (*per* Maule, J., in *Munday v. Stubbs*, 10 Com. Ben. Rep. 432; 1 Law Chron. 120). Accordingly, by sec. 108 of the Consolidation Act, "in any such action [as that mentioned in sec. 107, *ante*, vol. 1, p. 120] brought against the petitioning creditor, either alone or jointly with any messenger or

assistant or other person so appointed by the court, for anything done in obedience to the warrant of the court, proof by the plaintiff in such action that the defendant or defendants, or any of them, is or are petitioning creditor or creditors, shall be sufficient for the purpose of making such defendant or defendants liable, in the same manner and to the same extent as if the act complained of in such action had been done or committed by such defendant or defendants."

Messenger breaking open bankrupt's house, seizing goods or body.—We have stated in vol. 1, p. 121, the provisions of sec. 109 of the act, whereby the messenger acting under the warrant of the court is authorised to break open the bankrupt's house, &c., and seize upon his body or goods, and we may observe that it is usual for the commissioner to sign such a warrant in every case, so that the messenger may use it if requisite. The warrant would not be valid if granted to any one else (*Story v. Stevenson*, 2 Car. and Pay. 464; and see as to the messenger generally, 1 Law Chron. pp. 120, 121; 138). If the goods be in the possession of a bailee, who has a lien on them, that lien should be satisfied before the goods are removed (2 Eq. Cas. Abr. 98).

Execution of warrants in Scotland or Ireland.—Secs. 110 and 111 of the act provide for the execution of warrants in Ireland or Scotland, and they are set out 1 Law Chron. p. 121.

Death of bankrupt.—By sec. 116 of the act, if any bankrupt shall die after adjudication, the court may proceed in the bankruptcy as if such bankrupt were living. Death between the petition and adjudication will still abate the proceedings, and no provision has been made for any extension of time to executors for the purpose of disputing the adjudication, so that they would be bound to commence a proceeding for that purpose within the time specified by sec. 233 (see *Humfrey v. Scroope*, 18 Q. B. 509). Where one of the bankrupts died before the adjudication under a joint fiat, it was ordered to be amended by omitting his name. (*Ex parte Hall*, 1 De Gex, 332).

Summoning and examining bankrupt.—By sec. 117 of the act, the court may summon any bankrupt before it, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time appointed by the court (having no lawful impediment made known to and allowed by the court at such time), it shall be lawful for the court, by warrant, to authorise and direct any person or persons the court shall think fit to apprehend and arrest such bankrupt, and bring him before the court; and upon the appearance of such bankrupt, or if such bankrupt be present at any sitting of the court, it shall be lawful for the court to examine such bankrupt after he shall have made and signed

the declaration contained in the schedule W. to this act annexed, either by word of mouth or on interrogatories in writing, touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination so reduced into writing the said bankrupt shall sign and subscribe. Sec. 245 gives a general power to take all evidence upon oath, but this and the following section would seem to render an oath unnecessary in the case of the bankrupt and his wife; under sec. 254, however, false answers will subject them to the punishment of perjury, and under sec. 260, the answering unsatisfactorily is punishable by imprisonment.

Summoning and examining the bankrupt's wife.—By sec. 118 of the act, "it shall be lawful for the court to summon before it the wife of any bankrupt, and to examine her, after she shall have made and signed the declaration contained in schedule W. to this act annexed either by word of mouth, or interrogatories in writing, for the finding out and discovery of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of by such wife, in her own person or by her own act, or by any other person, and she shall incur such danger or penalty for not coming before the court, or for refusing to be sworn and examined, or for refusing to sign or subscribe her examination, or for not fully answering to the satisfaction of the court, as is hereinafter provided."

Bankrupt keeping out of way, or removing or concealing goods, may be arrested.—We have before noticed the provisions of sec. 99 for the arrest of a trader against whom a petition has been presented, and who is suspected of being about to leave England, or for the seizure of his goods, and that such arrest and seizure are only temporary. By sec. 119, power is given, after adjudication, to arrest the bankrupt where he is about to quit England, or remove or conceal his goods. This section enacts:

"That if in any case it shall be proved to the satisfaction of the court that any bankrupt is keeping out of the way, and cannot be personally served with a summons, and that due pains have been taken to effect such personal service, or that there is probable cause for believing that he is about to quit England, or to remove or conceal any of his goods or chattels, unless he be forthwith apprehended, it shall be lawful for such court, by warrant, to authorise and direct any person or persons it shall think fit to apprehend and arrest such bankrupt, and bring him before the court, to be examined in like manner as if he appeared upon a summons."

Summoning persons having bankrupt's property.—By

sec. 120 (see sec. 250 as to the costs), the commissioner is empowered to summon—1, persons having in their possession any of the bankrupt's estate; 2, debtors to the estate; 3, any persons whom the commissioner may believe capable of giving information respecting the bankrupt, his acts, or estate. The following is the enactment:—"That after adjudication it shall be lawful for the court to summon before it any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person the court may believe capable of giving information concerning the person, trade, dealings, or estate of the bankrupt, or concerning any act of bankruptcy committed by him, or any information material to the full disclosure of his dealings; and the court may require such person to produce any books, papers, deeds, writings, or other documents in his custody or power which may appear to the court necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the court is authorised to inquire into; and if such person so summoned as aforesaid shall not come before the court at the time appointed, having no lawful impediment (made known to the court at the time of its sitting, and allowed by it), it shall be lawful for the court, by warrant, to authorise and direct the person or persons therein named for that purpose to apprehend and arrest such person, and bring him before the court for examination."

By sec. 250, the person summoned as having property of the bankrupt, or supposed to be indebted, may have his costs and charges awarded him out of the estate by the court, and those summoned as witnesses are entitled to the tender of their expenses as upon a subpoena. The suspicion required seems to be that of the party applying for the summons, and not of the commissioner (Cooper v. Harding, 7 Q. B. 928). The warrant may be both for the examination of the party and the production of documents in his custody or power that may be essential, and the person summoned is bound to come at the time appointed, and to wait until he can be examined (Wright v. Maude, 10 M. and W. 527), and he may be imprisoned for refusing to be sworn, or for answering unsatisfactorily, or not producing the required documents, or not signing his examination (see sect. 260). The power is limited to questions relative to the person, trade, dealings, and estate of the bankrupt, and, therefore, where an executrix of a debtor had pleaded *plene administravit* in an action by the assignees, she could not be examined as to the truth of the plea (*ex parte Solarte*, Mont. 425). There would be no power to enforce costs against persons summoned under this clause by

imprisonment (see *Watson v. Bodell*, 14 M. and W. 57). It would be an order without jurisdiction, and render the commissioner and messenger who executed it liable in trespass.

Service of the above summons.—The 121st sec. of the act, provides for the service of above-mentioned summons on parties keeping out of the way. It enacts: "That where it shall be shown by affidavit to the satisfaction of the court that any person to whom any such summons is directed as aforesaid is keeping out of the way, and cannot be personally served therewith, and that due pains have been taken to effect such personal service, it shall be lawful for the court to order, by indorsement upon the summons, that the delivery of a copy of such summons to the wife or servant, or some adult inmate of the house or family of the person, at his usual or last known place of abode or business, and explaining the purport thereof to such wife, servant, or inmate, shall be equivalent to personal service, and in every such case the service of such summons in pursuance of such order shall be and be deemed and taken to be of the same force and effect, to all intents and purposes, as if the party to whom such summons was directed had been personally served therewith."

The examination of persons so summoned, or persons present at any sitting.—By sec. 122 of the Consolidation Act, "Upon the appearance of any person summoned or brought before the court upon any warrant as aforesaid, or if any person be present at any sitting of the court, it shall be lawful for the court to examine every such person upon oath either by word of mouth or by interrogatories in writing, concerning the person, trade, dealings, or estate of any bankrupt, or concerning any act or acts of bankruptcy by any bankrupt committed, and to reduce into writing the answers of every such person, and such answers so reduced into writing such person examined is hereby required to sign and subscribe."

Letters addressed to the bankrupt to be delivered to the assignees.—By sec. 124 of the Consolidation Act, the commissioner may order letters directed to the bankrupt to be re-directed or delivered to the official assignee. This section is as follows: "The court may order that for a period of three months from the date of any such order all post letters directed or addressed to any bankrupt at the place of which he shall be described in the petition for adjudication of bankruptcy shall be re-directed, re-addressed, sent, or delivered by the Postmaster-General, or the officers acting under him, to the official or other assignee or other person named in such order; and upon notice by transmission of a duplicate of any such order to the Postmaster-General or the officers

acting under him, by the official or other assignee or other person named in such order, of the making of such order, it shall be lawful for the Postmaster-General or such officers as aforesaid, in England, Scotland, or Ireland, to re-address, re-direct, send, or deliver all such post letters to the official or other assignee or other person named in such order accordingly; and the court may, upon any application to be made for that purpose, renew any such order for a like or for any other less period as often as may be necessary.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITV.

ANNUITY.—*Charged on corpus—Clear annuity to be purchased—Becoming depreciated.*—The mere fact of a testator's using the word "annuity" in a bequest, and charging it upon an estate, does not make the corpus of that estate liable to make good any deficiency in the annuity arising from subsequent events. The distinction was taken by Wigram, V. C., in *Attorney-General v. Poulten* (3 Hare, 555), where a sum of money was directed to be invested, the whole of the interest to be paid to certain persons; the stock was afterwards reduced by act of Parliament, and produced a less amount of interest, and it was held that all parties, whether called annuitants, or persons entitled to the yearly funds, must abate in proportion. But where the sole purpose and object of a bequest is to produce a clearly yearly sum of a certain amount, to be paid to a legatee for life, the case is very different. Thus, in *May v. Bennett* (1 Russ. 370), the testator directed his executors, after discharging all just and lawful debts, to lay out in their own names, and on what government security they pleased, so much money as would produce the annual interest of £54 12s. per year, for the sole use of his widow during her life, provided she did not marry. The testator further directed, if his widow did marry, that the £54 12s. per annum should cease to be paid to her, and that his executors should then sell so much of the said stock as would produce £300, such sum to be paid to his wife upon her marriage, the residue of the stock to form part of his residuary estate in like manner as if she did not marry: The Master of the Rolls held that the widow had a charge upon the capital for the full annual sum of £54 12s. The case of *Foster v. Smith* (1 You. and Coll. C. C. 193) is very distinct. The testator there gave a particular estate to his trustees, and directed them to receive the rents thereof, and to pay thereout an annuity to his widow for life. Sir J. L. Knight Bruce, L. J., thought that this was a charge upon

the corpus of the estate, but the Lord Chancellor, on appeal (1 Ph. 629) held that it was not. The *Attorney-General v. Poulten* (3 Hare, 555) is a similar case. In the following case the above decision of *May v. Bennett* was followed by the Master of the Rolls:—A testator directed his executors to invest so much of his personal estate in stock or other government or real securities as by the dividends, interest, and annual proceeds thereof would be sufficient to produce the clear yearly sum of £40, and to pay the dividends and annual produce of the said stock to his wife for her life, and as to, for, and concerning the said stock, funds and securities so to be purchased from and after the decease of his said wife, to divide the same among the persons in the will mentioned. The executors purchased the sum of £800 Navy £5 per cents. to answer the annuity, which stock, by reason of successive conversions, became insufficient to pay the annuity in full: Held, that the widow was entitled to a clear annuity of £40, and that the corpus of the fund was liable to make good the deficiency. *Mills v. Drewitt*, 1 Jur. N. S. 816.

ASSETS.—*Descended estates exonerating estates devised subject to a mortgage* [vol. 1, pp. 154, 170, 408].—The following is a case not within the late act (vol. 1, p. 154). It was settled by Galton v. Hancock (2 Atk. 430), and Watson v. Buckwood (9 Ves. 447), that unless there was a clear intention of exonerating from a mortgage the real estate descended as against the devised estates on which the mortgage is charged, such real estate was the primary fund for payment of the mortgage. And it has long been settled that a devise of estates subject to the mortgages thereon in no way exonerates the primary fund: to do that there must be an expression of intention to exonerate, and not merely a devise subject to the charges. In the following case there was a devise of estate L., subject to the payment of part of a sum charged thereon to J. L. absolutely; devise to trustees in trust for J. G. for life, with remainder to her children of estate F., subject to the payment of the remainder of the sum charged thereon and on estate L., and also estate S. The deviser died intestate as to another estate, B., and directed his trustees to pay his debts and charges out of his personal estate, which was insufficient for those purposes: Held, affirming the decision of V. C. Wood, that J. G. took estate S. devised in trust for her exonerated from the payment of the charge, and that the descended estate was applicable in exoneration of the devised estates for its payment. *Goodwin v. Lee*, 26 Law Tim. Rep. 1.

BOUNDARIES.—*Confusion of—Commission to ascertain and set out—Privity between the parties.*—The subject of the jurisdiction of courts of equity to

direct a commission to set out the boundaries of lands where they have been for some time confused was considered in the case of the Attorney-General v. Stephens (noticed *ante*, p. 86), and since our publication reported also in 25 Law Tim. 316, and which will probably also be reported in many authorised and unauthorised reports. In that case V. C. Wood observed that *Wake v. Conyers* (1 Eden, 381) and other cases have "conclusively established that there must be a privity between the party seeking to have the boundaries ascertained and the party with whose property those boundaries are confused, and that there must not be a mere adverse holding, but a privity between them; and, further, that there must (according to some cases) be some duty owing by the party with whose lands the other property has become intermixed. The clearest case is where the relation of landlord and tenant has been established, and the tenant was bound to hold lands as being wholly distinct from his own property which he holds in another capacity, so that the landlord might ascertain his own lands, and the tenant could not turn round and put him to get his lands as he could, and proceed by ejectment. It does not appear that these lands have been handed over to the Earl of Portland for the express purpose (as contended in argument) of being confused with his own lands. Then it has been contended that, looking to the position of defendant from year to year, and the succession of tenants, there was no privity with any of the preceding tenants, that each successive owner found the property mixed with his own, that the parish had handed it over to him in this state, and could not now require it to be set out; I cannot, however, look upon these successive owners in fee, who, for their convenience, were allowed by another person having a small portion of land suitable for their holding to occupy it, as having no duty to perform with regard to it, because there was no privity between the parties. The case of a lord of a manor with respect to intermixed copyholds is very similar; and the Duke of Leeds v. Lord Stafford (4 Ves. 180) bears upon the point, and especially in the form of the decree which shall follow. Upon this question of privity in that sense the parish is not prevented from having the land set out." *Attorney-General v. Stephens, the Putney Charity*, 25 Law Tim. Rep. 317.

COPYRIGHT.—[vol. 1, pp. 126, 231, 272]—*Songs—Musical composition—Adaptation—Appropriation of description.*—The following decision will possibly be a leading case respecting the piracy of songs, and we may therefore state that V. C. Wood observed that there were four things by means of which a song, which had attained popularity, was

distinguished, viz., its name, the person by whom it was sung, the name of the composer, and that of the publisher. In the following case the injunction was granted, though the defendant had not touched the two latter points, but had appropriated the two former, viz., the name of the song and the name of the singer. C. was the publisher in England of a foreign song called L. D., under the title of M., which had been adapted to a foreign tune, and on the title-page of which C. placed a portrait of a popular singer of the song. S. published A.'s song, the air of which was the same, but the words were the original words of the foreign song, while the air had symphonies and accompaniments, and entitled it "M. D." S. placed a portrait, slightly varied, of the same popular singer on his publication. Both publications stated on the face of them that the song was sung by Madame A. T. at J.'s concerts. The court granted an injunction to restrain the publication of S., on the ground that C. had appropriated the name "M.," and that he had stated his song to have been sung by Madame A. T. at J.'s concerts, which he had no right to do, and the case of piracy was considered too glaring to require the plaintiff to bring an action to support his title, which is usually directed to be brought in cases of the piracy of copyright in the same manner as stated *infra* as to patents. *Chappell v. Sheard*, Week. Rep. 1854-5, p. 646; 26 Law Tim. Rep. 3.

DEVISE.—"Issue" in will of real estate.—In wills of real estate, the word "issue," unless there be something to show a contrary intention, means "heirs of the body," and includes all descendants to all time. *Woodhouse v. Herrick*, 1 Kay and John, 352.

EXECUTOR.—*Discretion—Consulting cestuis que trust in applying to court—Neglect to keep up policy of assurance.*—The following case is a very useful one in the law of executorship, for in it the V. C. Kindersley considered the subject of the discretionary powers of an executor, and laid it down that an executor may have a discretion given to him by the express terms of the testator's will, and such discretion he may, of course, exercise, and if any person alleges that he exercises it carelessly, or improperly, or for his own benefit, the onus of proving that allegation rests with the party making it: the court will not assume that he exercises that discretion improperly, but it must be established by proof. He may also have a general discretion as executor—i. e., as incident to his office, which is a very different species of discretion from the former one. He cannot under that say: "I will do whatever in my discretion as executor I think fit." If he deals with the assets of his testator in a mode not ordinarily allowed to executors, he must prove that he was in such a

position with regard to the estate and those interested in it as to render such peculiar dealing with the assets necessary and unavoidable. An executor ought in such a case to consult with his cestuis que trust, or, if an administration suit is pending, he should apply for the direction and assistance of the court. Where an executor effected a policy of assurance for seven years on the life of a debtor to his testator's estate without consulting his cestuis que trust, paid some of the premiums on the policy out of the testator's assets; then without referring to his cestuis que trust, and (although an administration suit was pending) without applying for the direction of the court, at his own discretion, and because, as he alleged, the testator's estate was deficient, discontinued the payment of the premiums, whereby the policy was lost, and the debtor died within the seven years, held that the effecting the policy was, under the circumstances, an exercise of sound discretion, but the letting it drop was unwise, and, at least, he should first have consulted his cestuis que trust, or have applied to the court; and that the executor must be declared liable for the amount that would have come to the estate if the policy had been duly kept up; but he was allowed in his accounts those sums which he had actually paid in respect of the premiums. *Garner v. Moore*, Week. Rep. 497; 26 Law Tim. Rep. 11.

HUSBAND AND WIFE.—*Reversionary renewable leaseholds of wife—Barred by fine sur concessit.*—The following is a case raising a question of some importance as to the effect of the abolished fine on an equitable renewable leasehold term of a married woman. The question was, whether a fine which it was admitted was effectual destroyed the wife's interest absolutely, or did it merely extend to the term then actually in existence, so as to leave the wife the benefit of the renewed terms: it was held, that as her interest under the original lease was destroyed by the fine, and that the original lease was the root from which all the renewals grew, that she could have no interest in such renewal. It appeared that by a marriage settlement, dated in 1815, renewable leaseholds for years were conveyed to trustees upon trust to renew, &c., and then in trust for J. B., the testator, for life; remainder to raise certain sums in certain events which happened; remainder to the intended wife for life; remainder in the events which happened to the wife absolutely. By another indenture of settlement, dated in 1823; reciting the settlement, and that the leaseholds had been renewed, and were now held for twenty-one years, from 1821, and that there was no issue, nor probability of issue, the husband and wife covenanted to levy a *fine sur concessit* of the leasehold hereditaments which was to enure, to vest them in a new trustee to

extinguish a trust in the original marriage settlement for raising a sum of money, but subject to all the other trusts in the marriage settlement anterior to the trust for the wife, and subject as aforesaid to enure to the new trustee "during all the rest, residue, and remainder of the said term of twenty-one years, from 1821, so lately granted," nevertheless upon trust for the husband absolutely. The husband died in 1831, the leasehold hereditaments having been again renewed in the interim. The wife survived the year 1842, and died in 1853: Held, that the leaseholds and all renewals of the said lease were bound and conveyed as against the wife surviving by the indenture of 1823, and the fine levied in pursuance thereof, and that therefore the renewed term formed part of the husband's estate. *Dickens v. Unthank*, 1 Jur. N. S. 916; 26 Law Tim. Rep. 26.

ILLEGITIMATE CHILDREN.—*Gifts to, when valid* [vol. 1, p. 57].—On a gift, whether by settlement or will, to "children" generally, illegitimate children cannot take, if there be legitimate children also, who answer the description of the gift (vol. 1, p. 57); but notwithstanding what Sir John Leach said in *Bayley v. Molland* (1 Russ. and Myl. 581), referred to 1 Chron. p. 57, V. C. Wood has recently held, in the following case in which there were no legitimate children, that if, in making a gift, words are used which cannot be explained except by reference to the illegitimate children, they are not to be excluded. A settlement by deed contained an ultimate limitation "to all and every the child or children, as well those already born as those hereafter to be born" of R., and E. his wife. At the date of the settlement R. and E. had five illegitimate children; they had then been married five years without any issue; and they died without ever having had any legitimate issue. The settlor was the sister of E., and acquainted with the circumstances: Held, that the five illegitimate children were entitled under the limitations. *Gabb v. Pendergast*, 1 Jur. N. S. 900; 1 Kay and J. 439.

INTERPLEADER.—*Assignment of policy of assurance—Bankruptcy of assignor*—[vol. 1, pp. 10, 55, 372].—The following case and decision will illustrate our remarks at p. 272 of vol. 1, to the effect that the doctrine of equitable interpleader does not appear to be well understood; and we may add to what is there stated the following extract from the judgment of the Lord Chancellor, who observed "that the foundation of the right to file a bill of interpleader is, that there is a conflict between two or more persons claiming the same debt or debts. That is stated in all the cases, all the authorities, and all the books of treatise: it is a matter that admits of no doubt. When such a state of things

existed, and when that double claim has not been occasioned by the conduct of the person who is liable to discharge the debt or obligation, he may obtain the assistance of a court of equity, and, upon bringing into court the amount of the debt in dispute, the court will relieve him, and put the conflicting claimants to litigate their right between one another. I guard myself in that way by saying, that when the liability is not occasioned by their own act, then there is no case of interpleader. That was the case before Lord St. Leonards in *Drury v. Warren*, in which a person having paid a sum of money into a bank in the name, I think, of his brother, and having, whether rightly or wrongly, taken on himself to act, the bankers gave it out to him again, and he deposited it again in the name of a sister, or some other person; and Lord St. Leonards held, upon very intelligible principles, that that was no case for interpleader on the part of the bankers. They had given a right of action in respect of what was in truth the same sum of money to two different people, and that would not enable those two to litigate between themselves; both of them might have acquired a right. I think pretty much the same ground of decision guided Lord Cottenham in the case of *Crawshay v. Thornton*. He said: 'If there be a double claim, which has been occasioned by the act of the party seeking interpleader, he cannot have relief from the court.' In order, however, to establish a case for interpleader, it is necessary there should really be conflicting claims, and the question is here, whether there are conflicting claims, or rather, I should say, whether there were when the bill was filed. The facts were as follows: 'In 1825 H. effected a policy of assurance on the life of G. for £3,000, in the Atlas Assurance Company. The policy was assigned by H. in 1839 to S. and B. In 1834 H. took the benefit of the Insolvent Debtors' Act, when his property and effects became vested in S., the provisional assignee. In 1853 G. died, and the policy, which with bonuses and accumulations had increased in value to the sum of £4,526, became payable. S. and B. claimed the amount due upon the policy, and commenced an action against the company for its recovery. This claim was disputed by H. and S., who threatened the company with an action for the amount. The plaintiff, as representing the company, filed a bill of interpleader, to have the rights of the parties to the fund determined and to have the proceedings at law stayed. The Lord Chancellor held, varying the decree of the Vice Chancellor, that there was no ground for interpleader, for S.'s claim was not an adverse claim; it was nothing but a claim after S. and B. were satisfied, for the assignment to S. and B. was not disputed;

and the bill was dismissed, with costs, against S. and B.; and also against S., but without costs as against H. The Lord Chancellor observed that he did not mean to say that a mortgagor might not by his conduct make out a case, in which a debtor might file a bill of interpleader against him and his mortgagee; as, for instance, if the mortgagor gave notice to the debtor that since the mortgage he had satisfied the demand of the mortgagee, so that the assignment by way of mortgage was no longer in force." *Desborough v. Harris*, 26 Law Tim. Rep. 1.

LAND TAX [vol. 1, pp. 299, 379].—*Redemption of by tenant for life*—38 Geo. 3, c. 60, s. 17.—The doctrine of the Land Tax Redemption Acts does not appear to be well understood by the profession, and therefore the following case may be acceptable, though we should have made it longer if we had not elsewhere stated the acts and their effect fully. Under the stat. 38 Geo. 3, c. 60, two classes of persons are entitled to redeem land tax: the first-class comprises persons interested in the land out of which the tax issues; the other comprises strangers who, after notice to the first-class, may also purchase. Persons of the first-class, who have only limited interest, may, under sec. 17, 37, and 77, declare an option to purchase as strangers, *e. g.* a tenant for life may purchase entirely for his own benefit, and in that case he has to enjoy the land-tax as an annuity issuing out of the lands, subject to redemption by the party next in succession. If he do not declare such option, then the lands, &c., shall be charged in his favour, with the amount of consols transferred by him, and with the payment of such an annual sum, by way of interest, as shall equal the amount of the land-tax redeemed. When a man contracts to sell, he is at once, independent of all covenants, taken to undertake to sell free from all incumbrances and charges. Where the option given by the above act is not exercised, there is no longer any land-tax, but only a rent-charge in lieu of it (as was laid down in *Ware v. Polhill*, 11 Ves. 257). Such a charge is not in the position of land-tax (which is not considered an incumbrance), but is merely an equitable charge on the land belonging to the same person who has the equitable estate in the land. If the same trustees, who take the legal estate in the land, take a legal conveyance of the rent-charge, the consequence of that is an entire merger of the charge. If this take place in bare trustees, that may have no effect on the equitable interests, if the equitable interests be split up between tenants for life and remaindermen, as to which see *Blundell v. Stanley* (3 De Gex and Sm. 433), which is distinguishable from the case about to be noticed, by the circumstance of the equitable interest being split up between different equitable owners,

instead of being consolidated in one person. Trustees of an infant tenant for life redeemed the land-tax under the above act of the 38 Geo. 3, c. 60, s. 17. The tenant for life died, bequeathing the land-tax, or rent-charge in lieu of land-tax, to the next tenant for life. The second tenant for life dealt with the rent-charge in lieu of land-tax as a subsisting charge, and died in 1841, bequeathing it to his second son, but directing by his will, that if his eldest son, who would succeed to the family estates as tenant in tail, should signify his desire to purchase within one year, at a fixed price, he was to have it. The eldest son of the second tenant for life did signify such desire. He afterwards suffered a recovery and conveyed all his estates to trustees for sale to pay his debts, with an ultimate remainder to himself beneficially. The trustees sold, "subject to land-tax, if any." Held, that the purchaser was entitled to have a conveyance, discharged from the rent-charge in lieu of land-tax, which the court held to be merged in the land, the equitable interest in the rent-charge and in the land being in the same person, and not split up between several owners; and the same trustees who took the legal estate in the land (on the conveyance to them to pay the debts of the eldest son of the second tenant for life, and who was also tenant in tail of the lands), having also taken a legal conveyance of the rent-charge, and the equitable interests being consolidated in one and the same person. *Bulkeley v. Hope*, 1 Jur. N. S. 865.

MORTMAIN.—*Incorporated society for promoting the building and repairing of churches*, 43 Geo. 3, c. 108—*Devise to sell and pay over proceeds to the society void.*—By the 43 Geo. 3, c. 108, any person not under disability may, by enrolled grant, or by devise, three months before his death, give to any person or corporation his estates in lands, not exceeding five acres, or goods and chattels, not exceeding in value £500, for or towards the erecting, re-building, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the united Church of England and Ireland are used, or any mansion-house for the residence of any minister, or of any outbuildings, churchyard, or glebe. A decision has been come to on this act by V. C. Wood, and which has been confirmed by the Lord Chancellor, which affords a good specimen of the technical character of our law, and the tendency to stick to the letter rather than follow the spirit of legislative enactments. The decision we refer to is that, though a man may give by will five acres of land for the erecting, &c., such a church as aforesaid, yet he may not direct the same, or ever so small a portion, to be sold, and the proceeds, to the extent of £500 (not even if the whole value be less than £500), to be paid for such purpose; the gift, to be good, must be of a specific

piece of land for a specific object. The following is the case:—A testator by a will, executed more than three calendar months before his death, devised two freehold houses to trustees, upon trust, to sell and invest the purchase-money in government securities, and to pay the dividends to his wife for life, and at her death to make over and transfer the principal sum so invested "to the treasurer for the time being of the Incorporated Society for promoting the Enlargement, Building, and Repairing of Churches and Chapels, to be applied to the uses and purposes of that Society." Held, affirming the decision of Sir W. P. Wood, V. C., that this devise was not protected by the 43 Geo. 3, c. 108, either in its entirety, or to the extent of £500, but was invalid under the Mortmain Act, 9 Geo. 2, c. 36: Held, also, that the five acres spoken of in the 43 Geo. 3, c. 108, were five acres to be specifically enjoyed. *The Incorporated Church Building Society v. Coles*, 1 Jur. N. S. 761.

PATENT [*ante*, p. 91]—*Infringement* [vol. 1, p. 312]—*Injunction—Award—Patent established.*—In patent cases, where the patent is recent, and the patent has not been contested at law, or been submitted to in an adverse suit, courts of equity will send the patentee to law, and oblige him to establish the validity of his title (if the same be disputed), before it will grant him the benefit of an injunction (*Hill v. Thompson*, 3 Meriv. 622; *Electric Telegraph Co. v. Nott*, 11 Jur. 158). But even in this case the courts will use a discretion, and whenever they see sufficient ground of doubt they will direct the defendant to keep account of his profits pending the proceedings at law (2 Daniell's Chanc. Pract. 1610, 2nd edit.). In the following case the award of an arbitrator was considered as equivalent to the verdict of a jury:—Where a patentee had brought an action for damages for the infringement of his alleged patent, and at the trial an arbitration had been agreed to, upon which the arbitrator by his award had established the validity of the patent, and the patent had been again invaded by a process only colourably different from the mode in which it had been invaded in the case upon which the action was brought; the court, upon a bill filed for an injunction to restrain the infringement, held that the award of the arbitrator must be considered as equivalent to a verdict establishing the validity of the patent, against which there had been no motion for a new trial. *Lister v. Eastwood, Same v. Frith, Same v. Clough, Same v. Leabler*, 26 Law Tim. Rep. 4.

POWER.—*By instrument in writing "executed"* [vol. 1, pp. 110, 111, 201].—The following case is important, as showing the willingness of the courts to support appointments under powers, they having, indeed, before held that the words "instrument in

writing sealed and delivered" to be applicable to any kind of instrument, if the formality of affixing a seal to it has been observed, although the terms of the power evidently pointed to an execution by deed. In fact, the courts dispense with mere forms in cases where there is a distinct expression in writing of the donee's intention to exercise his power, with the other formalities, if any, required by the power: the court presumes everything in favour of the intention to exercise the power if it is clearly expressed (see 1 Law Chron. p. 202). A bequest of personal property to three trustees, A., B., and C., "upon trust to dispose of the same in whatever way A. shall by any deed or deeds, instrument or instruments, or by his will appoint; provided that no such deed, instrument, or will shall be taken to be an execution of this power unless the said deed, instrument, or will be executed after my decease;" and subject thereto upon trust for A. for life. This was held to be a power (as distinguishable from a trust) exercisable by any instrument in writing, whether a deed or not, if such instrument sufficiently referred to the power, or to the property the subject of it, or if it made a general gift, and the appointor had no property of his own to which it could refer. *Brodwick v. Brown*, 1 Kay and John. 328.

SHIPPING.—*Ship Registry Acts—Fraud* [vol. 1, pp. 123, 412].—*Proceeds of sale of ships—Registry acts do not apply to contracts respecting the proceeds of sale of ships.*—Notwithstanding the doctrine stated in vol. 1, pp. 123, 412, that the operation of the Ship Registry Acts is to preclude all application of the equitable doctrine of notice, agreements as to the produce of the sale of a ship may be enforced in equity at the instance of a person who does not appear on the register as the owner; there is nothing in the registry acts to preclude a person whose name does not appear on the registry from having a right or interest in the produce of the sale of a ship. The cases of *Brewster v. Clarke* (2 Mer. 75), *Newnham v. Graves* (1 Mad. 399, n.), and *Battersly v. Smyth* (3 Mad. 110), are all cases in which an endeavour was made by means of the contract between the parties, or their acts, to obtain a share in existing ships which were registered in the names of other persons. The case of *Follett v. Delany* (2 De G. and S. 235) is of that description, and the V. C. avoids expressing any opinion as to what would have been the result of the case if it had been one of fraud. In the case of *M'Calmont v. Rankin* (2 De Gex Mac. and G. 403) it was expressly laid down that no interest in a ship could be acquired in such cases. It also points out that although the court has frequently spoken of fraud making an exception, yet there is no case to be found in the books in which the particular fraud which would

create the interest in the ship has occurred, but the Lord Chancellor expressly says that his decision is not in any degree to affect the produce arising from the sale of the ship. The passage is this: "It has been most elaborately argued that I might and ought to give effect to the transaction as regards the proceeds of the vessel, although I cannot affect the vessel itself. I do not lay down any rule that parties cannot authorise a ship to be sold, and direct in what manner the money shall be applied. That is quite a different question. But the question before me is this: the plaintiffs claim the right under certain documents which they say vest the property of the vessel in them but for the Ship Registry Act; and being forced to relinquish such right to the vessel, they say they have an equity to that which represents the vessel, namely, the price produced by the sale of the vessel, and that a court of equity is bound to give effect to that claim." His lordship then proceeds to state that in his opinion that is not so, and that he can only regard the contract under the documents which were produced as giving no right to the vessel, and consequently that the plaintiffs were not entitled to the proceeds. His Lordship adds, "I do not lay down any rule that parties cannot authorise a ship to be sold, and direct in what manner the money shall be applied." In other words, an agreement directing a ship to be sold, and directing in what manner the money to arise from the sale of the ship shall be applied, is not open to the objection of being an infringement of the registry acts, and such was the decision of the Master of the Rolls in the following case:—A., the registered owner of a vessel, agreed with the plaintiffs to sell the vessel, and apply the proceeds in the manner specified in the agreement. He sold it to the defendant, R., who registered it in his own name, and admitted by his answer that he was indebted to A. for the price of the vessel, and submitted to apply the amount as the court should direct: Held, that as the agreement did not give the plaintiffs any right in the ship, but affected only the proceeds of the vessel, the Ship Registry Act did not apply, and the money was directed to be applied according to the terms of the agreement. *Armstrong v. Armstrong*, 1 Jur. N. S. 859.

TENANT FOR LIFE & REMAINDERMAN.
—*Mortgage debt, interest on, by whom payable—Account.*—The general rule with respect to the relation of tenant for life and remainderman in keeping down incumbrances on the estate to which they are entitled is this, that it is the duty of the tenant for life to keep down the interest, and, upon his failing to do so, the remainderman has his remedy against the tenant for life in respect of such failure. The above rule has been applied by V. C. Stuart to

the case of an estate charged as a further security for a mortgage debt, being devised to a tenant for life and remainderman in fee, and the interest being for many years paid by the remainderman and his assignee, the tenant for life paying nothing; his Honour held that the tenant for life was bound to keep down the interest during his life. Therefore, where default was made in the payment of interest, and the mortgagee entered upon and sold the original security, thereby paying himself part of his mortgage debt, and the tenant for life paid the remainder, taking a transfer of the mortgage security, it was held, in a foreclosure suit by the representatives of the tenant for life, that they were entitled to interest only from her death, and not from the date of the transfer. *Long v. Harris*, 1 Jur. N. S. 913.

TRUSTEE.—*Relief Act*, 10 & 11 Vic. c. 96 [vol. 1, p. 54, 375, 394, 416]—*Fund paid into court—Remedy by bill gone.*—The Trustee Relief Act, 10 & 11 Vic. c. 96, takes away the jurisdiction of courts of equity by bill against the trustee, in respect of money which he has paid into court under that act. *Thorp v. Thorp*, 1 Kay and John. 438.

WILL.—*Lapse—Gift to next of kin according to the statutes of distribution.*—Though the expression "next of kin," when used without other words, means "nearest of blood," yet this is not so where the words are followed by the expression "according to the statutes of distribution." The stat. of Chas. (22 & 23 Car. 2, c. 10, ss. 5, 6), after giving the estate to the wife and children, if any, if there be none, directs "the residue of the said estate to be distributed equally to the next of kindred of the intestate who are in equal degree, and to those who represent them." The stat. does, therefore, provide both for next of kin, and for those who take by representation of the next of kin. Then the stat. 1 Jac. 2, c. 17, s. 7, provides "that if after the decease of a father any of his children shall die intestate without wife or children in the lifetime of the mother, every brother and sister, and the representatives of them shall have an equal share with her." That enactment almost goes the length of placing a brother or sister in the same relationship as a mother. Where in a will, after referring to next of kin according to the statutes of distribution, it is added that the parties are to take "as if the legatee for life had never been married," that clearly points to the stats., that is, it is not to go according to the literal ordinary meaning of the term "next of kin," but to the persons designated by the stats., and in such shares and proportions as the stats. declare. This will explain the following decision:—M. devised all her realty and personalty, to be considered as personalty, and then gave the same to her daughter L. for life, remainder to J., the husband of L., for life, re-

mainder as L. should appoint, and, in default of appointment, "to the person or persons who should be her next of kin according to the statutes of distribution, and in the like manner, shares, and proportions as if she (L.) had died without having ever been married." L. died, leaving her mother, the testatrix M., and a nephew by the half-blood, *ex parte paternâ* (the plaintiff) her only next of kin entitled under the stats., but the plaintiff was not connected in blood with M. The testatrix died, leaving J. surviving, and also the plaintiff, who was then the sole next of kin to the daughter L. The defendants were the next of kin to the testatrix at the time of her decease, and also at the time of L.'s decease: Held, on demurrer, that there was no lapse, and that the plaintiff was entitled to the whole residuary estate. *Nichols v. Haviland*, 1 Jur. N. S. 891.

WILL.—*Revocation of by contract for sale—Repurchase by the testator of the same estate.*—Lord Hardwicke, according to Lord Rosslyn's note of *Parsons v. Freeman* (3 Atk. 741; Amb. 116; 1 Wils. 308), and in *Brydges v. The Duchess of Chandos* (2 Ves. jun. 431) said: "One rule is certain, that if a man is seised in fee, and disposes by will, and afterwards makes a conveyance to buy back a new estate, that is a revocation; so, if he devises the land, and levies a fine without any use declared, that is a revocation, and yet he takes back the old use unaltered, which is a prodigious strong case. These," he afterwards says, "are the uses of law, though counsel have doubted whether they extend to equitable interests without citing authorities; but I think they hold in equity, and am of opinion that what is a revocation at law shall hold in equity, even if the transaction with the assignees had been, not a new contract of repurchase, but an abandonment or rescinding of the contract of sale." Lord Eldon, according to what he said in *Knollys v. Alcock* (7 Ves. 558) would not admit that the abandonment would set up the will again; and Sir W. Grant, according to the report of *Bennett v. Lord Tankerville* (19 Ves. 170), very much doubted whether the abandonment of the contract would set it up again without republication. These expressions of such great lawyers are borne out by the principle of other decisions. According to the decision of Lord Hardwicke, in *Beard v. Beard* (3 Atk. 72), the execution by the testator of an instrument which was found to be inoperative as to the conveyance it purported to make, is enough to revoke his will. The same doctrine was recognised in *Hick v. Morse* (Amb. 315), and also recognised by and commented on by Lord Eldon, Sir W. Grant, and Lord Alvanley, in *ex parte the Earl of Ilchester* (7 Ves. 358), and by Lord Eldon again in *the Attorney-General v. Vigor* (8 Ves. 283). It

involves a principle which sufficiently accounts for Lord Eldon declining to admit that the abandonment of a valid contract would set up a will without republication. This doctrine does not, of course, apply to wills made since the new Wills Act. *T. A.*, in 1832, devised certain real estates to *W.* and *X.*, and by an agreement, dated in 1835, he contracted to sell to two purchasers part of the same estates, the hereditaments being expressed to be delineated and described in a map or plan signed by the parties to the agreement, but which was, as alleged, lost. The purchasers entered into possession, but did not pay the whole of the purchase money. Afterwards one died, and the other, his survivor and heir-at-law, became bankrupt. *T. A.* presented a petition to the Court of Review, and thereupon an order was made to the effect that he had a lien upon the property, and that the same should be sold, and *T. A.* should be at liberty to bid at the sale. *T. A.* became the purchaser for a smaller sum than his lien, and proved for the balance under the bankruptcy. *T. A.* died in 1843: Held, that the contract for sale by *T. A.* was a revocation of his will. *Andrew v. Andrew*, 1 Jur. N.S. 885.

EQUITY PRACTICE.

COSTS.—*Several sets—Trustees severing in defence.*—It is a frequent practice for trustees to sever in their defences, and employ separate solicitors and counsel, and in many instances the costs have been allowed. Indeed, in the case of *Gaunt v. Taylor* (2 Beav. 346; and see *Aldridge v. Westbrook*, 4 Beav. 212; *Woods v. Woods*, 5 Hare, 229), it was held that, where trustees appear by the same solicitor they will not, in general, be allowed the costs of putting in several answers, unless there be special reasons for such a course. In the following case, where one of two trustees, not the acting trustee, took a power of attorney from one of the cestuis que trust, and acted on her behalf and claimed a payment in her right, and afterwards, on a suit being instituted, by another cestui que trust, severed in his defence from the acting trustee, alleging that he knew nothing of the accounts: it was held that only one set of costs could be allowed, for a person who is a trustee for several cestuis que trust acts improperly in taking a power of attorney from one cestui que trust only, and ought to give up that position, and has no right to instruct any person to appear for him separately, for one solicitor might have appeared for him and his co-trustee as joint trustees, they offering jointly to pay over what was due whenever the court should determine who was entitled to receive it. *Hodgson v. Cash*, 1 Jur. N. S. 864.

INFORMATION.—*Death of all the relators—New relator, how appointed.*—Where all the relators

in an information relating to a charity die after decree, the application for the appointment of the new relator cannot be made by the Attorney-General, but must be made by the new relator, with the Attorney-General's consent. *Att. Gen. v. Harvey*, 3 Eq. Rep. 992.

PURCHASE OF LAND.—*Re-investment of produce of sold land in other lands—Tenant for life—Timber on the estate of considerable value.*—Upon a petition by a tenant for life without impeachment of waste for the investment of £6,100, part of a large fund in court, arising from the sale of the property, of which the petitioner was tenant for life, in the purchase of land, the court approved of the purchase, notwithstanding the timber on the property was valued at £1,800. *Re Jones' Settled Estates*, 1 Jur. N. S. 817.

SECURITY FOR COSTS [vol. 1, pp. 60, 204].—Where a plaintiff misdescribes his place of residence in the bill, the defendant is entitled to call on him to give security for costs (see *Bailey v. Gandry*, 1 Keen, 53; *Hurst v. Padwick*, 12 Jur. 21). In the following case it appeared that the plaintiff filed his bill, to which a demurrer was put in and allowed, with leave to amend; the costs were paid, and the bill was amended. The defendants claimed costs in a certain action which the plaintiff had brought against them, and in which he failed. The plaintiff, who was a labouring gardener, shut up his house in the country, leaving the furniture in it, and came to London, but acquired no new residence. He could not be found, though three months had elapsed. He described himself in his bill as of the house in the country: Held, that this was a sufficient description, and that the defendants were not entitled to call upon him to give security for costs. *Manby v. Bewicke*, Week. Rep. 1854-5, p. 646; 26 Law Tim. Rep. 3.

TITLE.—*Reference to chambers [ante, p. 50]—Approval of title.*—This case is stated *ante*, p. 50, but the point may be more neatly put thus: All questions of title relating to land in which money in court is to be invested under the order of the court, are, as a general rule, referred to chambers for consideration, and the judge in chambers will there consider whether he can approve of the title without sending it to the conveyancing counsel of the court. *Re Jones' Settled Estates*, 1 Jur. N. S. 817.

COMMON LAW.

ALTERATION IN BILL OR NOTE.—*Joint and several promissory note—Addition of another maker* [see 1 Chron. p. 380].—According to Pigot's case (11 Coke's Rep. 26c), if the party to a deed makes an alteration in a covenant, after the deed is executed, not only the covenant, but the whole deed

becomes void. The principle of this case was applied to negotiable instruments in *Master v. Miller* (4 T. R. 920), and it has, with one exception, been uniformly acted upon, down to the recent case of *Burchfield v. Moore* (3 El. and Bl. 683; S. C. 18 Jur. 727). The exception is *Calton v. Simpson* (8 Ad. and El. 136). In that case the defendant had, as surety, signed a joint and several promissory note with the principal debtor, having no reason to suppose that any one else was to sign it. Afterwards the payee, without the knowledge of the defendant, induced another person to sign it with a view to strengthen the security; and the court held that the defendant was still liable upon it. But the decision took place merely on refusing a rule to show cause why there should not be a new trial; and it seems to have proceeded on the ground that, as the new surety could not be liable on the note, by reason of the stamp laws, the alteration operated nothing, although the counsel urged that "a note with an altered date does not bind any one to the new contract, yet the old contract is void." The judgment of the court was, without further reasons, in these words:—"In the absence of all authority, we shall hold that this was not an alteration of the note, but merely an addition, which had no effect." In the case we are about to mention, Lord Campbell, delivering the judgment of the court, held that the above decision was contrary to the authorities, and that it is not law. The circumstances of the case we have above alluded to were as follows: a joint and several note was made, and after it was a perfect instrument, according to the intention of the parties, as the joint and several note of the defendant and E. B., and after it had been completely issued and negotiated, the plaintiff, without the consent of the defendant, caused it to be signed by A. C., as a joint and several maker, along with the defendant and E. B. The Court of Queen's Bench held that the instrument so altered would operate differently from the original instrument, whether the alteration were or were not material, and, therefore, defendant was discharged from liability; and a joint and several promissory note, although it contains two promises in the alternative, is one contract and one instrument, and, therefore, if it be designedly altered in any part by the payee, so as to alter the liability of the maker, it is entirely vitiated. *Calton v. Simpson* (8 Ad. and El. 136), overruled. *Gardner v. Walch*, 1 Jur. N. S. 828.

EVIDENCE.—*Secondary evidence* [vol. 1, p. 328]—*Where original document tendered by other party—What questions of fact are for the judge, and not the jury.*—In the following somewhat celebrated case the Court of Exchequer has decided a very important point in the law of evidence, arising out of the differ-

ence between original and secondary evidence, there being a material difference between discussing the question whether a piece of evidence which is really an original one is to be received, and where a piece of evidence is received, but is afterwards proved not to be either the original, or receivable at all. At a trial the judge must of necessity—for there is no one else to do it—try all questions that arise in the course of the inquiry before the case is ultimately presented to the jury, and, consequently, if any question of fact arises in the course of the trial which becomes necessary to be tried, as, for instance, any question of fact on which the admissibility of evidence depends, perforce the judge must try that question. Now, it is a well-established rule that secondary evidence is not admissible if the primary evidence can be procured, so that, in order to admit secondary evidence, it must be proved that reasonable efforts have been made to get the primary evidence. Where a party, who had made a *prima facie* case for the reception of secondary evidence of a document, proceeded to prove its contents by the parol evidence of a witness who had read the original, on which the opposite party interposed, and, showing a document to the witness, asked him if that was the original, which the witness denied: it was held, that the judge was bound to decide the collateral question whether the document thus offered was the original or not, and reject or receive the secondary evidence accordingly. *Boyle v. Wiseman*, 1 Jur. N. S. 894; 3 Com. L. Rep. 1071.

LANDLORD AND TENANT.—*Receipts for rent—Acknowledgment of title thereby—Estoppel.*—In the case of *Attorney General v. Stephens* (*ante*, p. 86), the effect of the payment of rents and acceptance of receipts for the same was considered, and V. C. Wood, in answer to the objection of counsel, that the acceptance of receipts for rent paid, in respect of parish land, was no admission of the land having been in the defendant's occupation, said he could not conceive a stronger admission than the receipts accepted as a discharge in respect of a particular relation between the party accepting and the party giving the receipt. Such receipts have constantly been held as evidence proving the tenancy (*Hitchings v. Thompson*, 5 Excheq. Rep. 50). This acknowledgment of a tenancy has been held (*Gouldsworth v. Knights*, 11 Mees. and W. 337) to amount to an estoppel, so as to prevent the party from denying in any way the right of his landlord with respect to the property for which he was paying rent. *Attorney-General v. Stephens*, *ante*, p. 86.

MINES.—*Obligation of owner of minerals to leave support for surface—Deed severing the surface and the minerals below—Reservation of powers of mining—Compensation for damage.*—The rights and obliga-

tions of parties where the surface belongs to one owner, and the minerals under it belong to another, appear to be well settled by the two cases of *Harris v. Ryding* (5 M. and W. 66), and *Humphries v. Brogden* (12 Q. B. 739; S. C. 15 Jur. 124). *Primâ facie*, the owner of the surface is entitled to support from the subjacent strata, and if the owner of the minerals works them it is his duty to leave sufficient support for the surface in its natural state. But the *primâ facie* rights and obligations of the owner of the surface, and of the minerals, may be varied by the production of title-deeds, or by other evidence. A deed of the 29th December, 1671, which severed the surface from the minerals contained a reservation of the mines to the grantor, with free and full power and liberty to work, sink, dig for, or win the same, and to drive drifts, make watercourses, or do any other act necessary or convenient for the working, winning, or getting the same, with a covenant by the grantor to pay to the grantee treble the damages, loss, or prejudice which the grantee should sustain by reason of such digging, working, &c.: Held, that the reservation was subject to the implied right of the grantee of the surface to support from the minerals, and did not empower the grantor to remove the whole of the minerals without leaving a support for the surface, though it was admitted that upon the severance of the surface and the minerals a deed might be framed empowering the owner of the minerals to remove the whole of them without leaving a support for the surface, compensation being made to the owner of the surface for the damage thereby occasioned to his tenement. But *Harris v. Ryding* (5 M. and W. 60) was considered an express authority to show that the deed of 1671 was not so framed; and, therefore, in an action by the grantee of the surface for improperly working the minerals, "without leaving any proper or sufficient support in that behalf," whereby the surface subsided, &c., the plea justifying under the reservation and the powers in that deed: Held, that the plaintiff was entitled to the verdict upon a replication which traversed that the acts complained of were "necessary for the working, sinking, digging, and winning the said mines," although necessary for the complete removal of all the minerals reserved. The practice of working formerly was to leave pillars for the support of the surface, but since 1810 the practice had been to work out all the coal, paying compensation for subsidence. It was admitted that if defendant was entitled to do so without leaving support, the mine had been worked skilfully and properly. The plea alleged that defendant did the acts complained of carefully, skilfully, and properly, and according to the course and practice of mining in such case used and approved of: Held, in accord-

ance with the opinion of Parke, B., in *Harris v. Ryding* (5 M. and W. 60, 69), that the course and practice alleged must be taken to be the course and practice used and approved of in the county of Durham at the time of the reservation, which, as above stated, was, till 1810, to leave ribs of coal to support the surface. *Smart v. Morton*, 1 Jur. N. S. 825.

PUBLIC COMPANY.—*Railway—Making unequal charges to some persons—Recovering overplus.*—In the judgments of the Lord Chancellor and Lord St. Leonards, on an appeal to the Lords respecting the construction to be put on the usual clause in railway acts (see the Railway Clauses Consolidation Act, c. 20, s. 90), that the rates of charge or tolls, in respect of goods carried by the companies, shall be made and charged equally to all persons, the following question was raised, viz., where a railway company are bound by the act to make equal charges to all persons, and they make unequal charges, whether the person overcharged can by action recover back the difference? Lord Cranworth, doubted whether he could. Lord St. Leonards was clearly of opinion that he could recover the difference. *Finnie v. Glasgow and South Western Railway Company*, 26 Law Tim. Rep. 14.

COMMON LAW PRACTICE.

JUDGMENT FOR PLAINTIFF.—*Mistake—Application by plaintiff to set aside judgment—Amendment of particular.*—According to the practice of the courts of common law, a defendant against whom judgment has been regularly signed, and execution issued, may make a summary application to set aside that judgment, either during the term, or as soon after as he can, on the ground of *mistake*, he paying the costs, and doing all that is necessary to restore the plaintiff to the position he would have been in if no such mistake had occurred. The following case shows that such an application may also be made by a *plaintiff*:—The plaintiffs had signed judgment for want of a plea, and received the amount of debt and costs from the defendants. The plaintiffs subsequently discovered that a sum which had been charged to a firm in which one of the defendants had been a partner ought to have been charged to the defendants. Upon an application to the court to set aside the judgment, and to allow the plaintiffs to amend their particulars of demand, and proceed with the action, it was held that the court had jurisdiction to grant the application if made within a reasonable time, the defendants being restored to the position they were in before the mistake was made. *Cannan v. Reynolds*, 1 Jur. N. S. 873.

JUDGMENT.—*For default of appearance* [vol. 1, p. 312]—*Setting aside—Form of affidavit of merits.*—Where final judgment had been signed in default of

appearance, under sec. 27 of the Common Law Procedure Act, 1852, it was held, by Parke and Platt, BB., (*dubitante*, Pollock, C. B., and *dissentiente*, Martin, B.), that such judgment may be set aside, and the defendant let in to defend on an affidavit of a defence on the merits, which does not disclose the ground or facts of such defence; also, *per* Pollock, C. B., and Platt, B., (*semb. cont.* Parke, B., and Martin, B.), that in such a case counter-affidavits ought not to be received. *Warrington v. Leake*, 3 Com. L. Rep. 1083.

BANKRUPTCY AND INSOLVENCY.

ACT OF BANKRUPTCY.—*Departure from dwelling-house*—*Notice thereof*—*Costs of official assignee*.—We have before (vol. 1, p. 191) noticed the provisions of the bankruptcy statute, and the cases thereon, as to the departing by a debtor from his dwelling-house, with the intention to defeat or delay his creditors, being an act of bankruptcy, and we have likewise (vol. 1, pp. 76, 192—195) noticed the act of bankruptcy by fraudulent grant or conveyance by the debtor of his property, and referred to (vol. 1, p. 76) the provisions of the act for protecting *bona fide* transactions with bankrupts prior to the petition without notice of an act of bankruptcy. The following decision will further illustrate these matters:—B., being considerably indebted, left his home, without leaving any money, and taking his tools and the greater part of his furniture, without saying why, or where he was going, and leaving directions to that effect. B. was in the same month duly declared bankrupt: Held, a departing with intent to defeat or delay his creditors, and, therefore, an act of bankruptcy. J., a creditor of B., being informed of the departure of B., and of his taking his tools with him, pursued him, and five days afterwards obtained from him a conveyance of lands for a consideration made up of £10 cash and his own debt, and an undertaking to satisfy certain other engagements of the bankrupt. On the ground of its having been executed after notice to the purchaser of a previous act of bankruptcy, the deed was directed to be given up to the creditors' assignee of the bankrupt, in order to be cancelled, on payment of the £10 to the defendant, no decision being given as to whether there had not been a fraudulent preference. *Hobson v. Brown*, 1 Jur. N. S. 920.

ADJOURNED HEARING.—*Description*—*Opposition on adjourned hearing*.—Where there is an inaccuracy in an insolvent's description, which renders an adjournment necessary to amend and re-advertise, upon such adjournment the case is still open for opposition at the instance of any creditors. *Re Davis*, 26 Law Tim. Rep. 6.

BAIL.—*Absence of insolvent on account of illness.*

—A prisoner, too ill to attend the insolvent court, may be excused from personal attendance upon his application to be discharged on tendering sureties for his appearance on the day appointed for his hearing. *Re Maugham*, 26 Law Tim. Rep. 6.

BREACH OF TRUST.—*Punishment twice for the same offence*.—In *re Watt* (20 Law Tim. Rep. 314), it was decided that a poor-rate collector, who is sued for and pays a penalty imposed by the Poor Law Act for not paying in his collection weekly, may be remanded by the Insolvent Court for a breach of trust, for any balance remaining in his hands on foot of the same collection. It has accordingly been decided in the following case, where a collector of public taxes becomes a defaulter, and is summarily convicted before magistrates, and sentenced to three months' imprisonment and hard labour, that will be no bar to the Insolvent Court remanding him for a breach of trust for the same defalcation. Misappropriation is evidence of a criminal intent, where it is not a mere balance of accounts. Where the insolvent conceals a portion of the money which he might have kept back, his punishment will be increased. *Re Crean*, 26 Law Tim. Rep. 13.

DESCRIPTION.—*Variance between schedule and order for hearing*.—The description of an insolvent in the order for hearing must follow the schedule, and if not, the order must be dismissed, and there must be a fresh service of the creditors for another hearing. *Re Hammond*, 26 Law Tim. Rep. 6.

PARTNERS.—*Joint and separate estate*—*Proof of solvent partner against the separate estate of the bankrupt partner*.—It was established by the case of *exp. Ferrell* (Buck, 345), that if upon taking the partnership accounts, a bankrupt is found indebted to his solvent partner in respect of the partnership transactions, such partner is entitled to prove for the same on the separate estate. And it has recently been decided by the commissioner that where one partner draws out the partnership money, and applies it to his own separate use, the solvent partner, by averring in his proof that he paid the partnership's debts and debited himself with half the loss, will be allowed to prove on the separate estate for the advances made by him, when these facts are not controverted. *Re Bradberry*, 26 Law Tim. Rep. 14.

PETITION.—*Description of petitioner*.—A man must petition in his right name, or the petition will be dismissed. *Re Diford*, 25 Law Tim. Rep. 328.

PROTECTION ORDER.—*Debts above £300*—*Trading description*—*Prior bankruptcy*.—A., being a trader, contracted debts, and being still a trader, he gave a bond and collateral securities. Having got rid of the bond by bankruptcy and certificate, but not of his liability on the other securities, he

petitioned the court for protection in respect of debts arising upon such securities: Held, that the trading carried on when the securities were given should form part of his description, and the debts being above £300 the petition must be dismissed. *Re Tucker*, 25 Law Tim. Rep. 328.

COUNTY COURTS.

COSTS.—*Less than £20 recovered* [vol. 1, pp. 62, 130, 425, 458, 459]—*Payment into court of less than £20—Nolle prosequi.*—To an action for more than £20 the defendant paid into court a less sum than £20, which the plaintiff took out in full satisfaction, and entered a *nolle prosequi* as to the residue. It was held that the money so paid into court, and taken out in satisfaction was not money recovered within the meaning of sec. 11 of the 13 & 14 Vic. c. 61, and that the plaintiff was entitled to his costs of suit without the order of a judge. *Chambers v. Wills*, 3 Com. Law Rep. 1120.

CRIMINAL LAW SESSIONS, ETC.

FALSE PRETENCES.—*Misdemeanor—Attempt to commit—Indictment—Fraud—Breach of contract—Delivering short weight—Attempt to obtain money by false pretences—Obtaining credit in account.*—An indictment in one count charged A. with a fraud, alleging that he had contracted with the guardians of the poor to deliver to the out-door poor of a certain parish loaves of bread of a certain weight, at a certain price, but that he had delivered to different poor people loaves of less weight, intending to deprive them of proper and sufficient food and sustenance, and to endanger their healths and constitutions, and to cheat and defraud the guardians: Held, that this count could not be sustained, as the delivery of a less quantity than that contracted for was a mere private fraud, no false weights or tokens having been used. Another count charged the defendant with attempting to obtain money from the guardians by falsely pretending to the relieving officer that he had delivered to certain poor persons certain loaves, and that each loaf was of a certain weight. The evidence was that he had contracted to deliver loaves of the specified weight to any poor persons bringing a ticket from the relieving officer, and that the duty of the defendant was to return tickets at the end of each week, together with a written statement of the number of loaves delivered by him to the paupers, whereupon he would be credited for that amount in the relieving officer's book, and the money would be paid at the time stipulated in the contract, namely, at the end of two months from a day named. The defendant having delivered loaves of less than the specific weight, returned the tickets, and obtained credit in account for the

loaves so delivered; but before the time for payment of the money arrived the fraud was discovered: Held, that this was a case within the statute against false pretences, because the defendant had been guilty of a fraudulent mis-statement of an antecedent fact, and had not merely sold goods to the prosecutors upon a misrepresentation of weight or quality. Quere, whether a case of the latter description is within the statute? Held, also, that although the defendant had obtained only credit in account, and could not, therefore, have been convicted of a complete offence, he might be convicted of an attempt to obtain money, he having done all that depended upon himself towards obtaining it: *Reg. v. Bagleton*, 26 Law Tim. Rep. 7; 3 Com. L. Rep. 1145.

HABEAS CORPUS.—*Central Criminal Court—Jurisdiction of inferior court.*—A prisoner who has been convicted in an inferior court (there being an allegation of the offence being committed within the jurisdiction), is not entitled to a writ of *habeas corpus* on the ground that the offence was committed out of the jurisdiction. *Exp. Newton*, 3 Com. L. Rep. 1122.

RAILWAY EXPENSES.—With reference to the little paragraph inserted at p. xvi, we may state that *Herapath's Railway Journal* mentions the costs of each of very many of the railways in existence and adds: "From Mr. Hadfield's return to the House of Commons in respect to parliamentary and law expenses, it appears that most irregular charges have been made to railway companies for the doubtful privileges conferred by their acts of Parliament. It would puzzle any one unacquainted with the mysteries of Parliament to account in any rational way for the variations in the charges to railway companies for acts of Parliament. Whether the great cost to some has arisen from an endeavour to promote the public good, or to advance private interests, does not appear. Doubts exist as to whether some knew, and others did not know, how to procure the favour and sanction of Parliament on more moderate terms than the average. At all events, the mystery hanging over the subject is one that requires some explanation, and a most searching investigation on the part of railway shareholders. It will be observed that the cost of obtaining acts of Parliament follows no rule. It is impossible to say before going to Parliament whether it will be £100,000 or £2,000; whether the line be 100 miles in length or it be only six miles the same doubt and uncertainty hang over the subject as to the cost of an act. There is one thing apparent, that the first acts obtained by railway companies cost a vast deal more in proportion than those obtained subsequently."

LORD TRURO

THE death of this ex-chancellor and ex-chief justice, better known as Serjeant Wilde, has been noticed in various publications, and on the whole favourably. Perhaps the most favourable was the notice in the *Examiner* newspaper, in which his unostentatious kindness to, among others, the son of the late Southey, was pointed out with deserved commendation. Lord Truro received the Great Seal in July, 1850, and held it until the formation of Lord Derby's Government in March, 1852. During this short but eventful period, of about 18 months, Lord Truro was called upon to discharge duties of greater magnitude and importance than would, in the ordinary course, have devolved on the Lord Chancellor in as many years. It was necessary to deal with the question of law reform without delay, and in a large and comprehensive manner;—to make some change in the office of Lord Chancellor itself, which should remedy the evils, arising from the acknowledged impossibility of his attending properly to all the duties of his office. It so happened, too, that during his Chancellorship, he was called upon to advise the Crown on the appointment of all the judges of the courts of equity, and two of the Common Law Judges: and he also had to exercise a more than usual extent of ecclesiastical patronage, including two large Metropolitan livings. He had also, on account of arrears, which had accumulated during Lord Cottenham's illness, to discharge a more than ordinary extent of judicial duties. It may be added that he discharged these high duties in a manner, deserving of the good opinion of the country.

FRIENDLY SOCIETIES AND COUNTY COURTS—NEW ORDERS.

HAVING already [*ante*, p. 62] noticed the Friendly Societies Act of last session (and see *ante*, pp. 136—139), we now give the orders issued by the Lord Chancellor for regulating proceedings under that act by and before the judges of the county courts. There are but six orders, with a schedule of forms of plaint, order thereupon, order for execution to issue, and execution against the defendant's goods, to which latter is appended a notice that the goods and chattels seized thereunder are not to be sold until after the end of five days next following the day on which they may have been taken, unless they be of a perishable nature, or at the request of the plaintiff. The forms we do not consider it necessary to give:—

1. *Proceedings to be by plaint.*—On the application of any person wishing to take proceedings in the No. 19 (Vol. II.)

county courts under the provisions of the act of the 18th and 19th Victoria, chapter 73, for consolidating and amending the law relating to Friendly Societies, the clerk of the court shall enter a plaint in the plaint book of the court, and issue a summons thereon, and take all other proceedings, and enter the same, as in cases within the ordinary jurisdiction of the court.

2. *Particulars.*—In every case of proceeding taken under the above act, the plaintiff shall, at the time of entering his plaint, deliver at the office of the clerk as many copies of a statement of the particulars of this complaint or demand as there are defendants, and an additional copy to be filed; and all such copies shall be taken to be and be treated as part of the summons.

3. *As to service of summons.*—Where the defendant is a trustee, member of the general committee of management, treasurer or other officer of a Friendly Society, the summons may be served at the usual place of business of the society, and in all other cases according to the ordinary practice of the court.

4. *Forms.*—The forms contained in the schedule hereto may be used in the several cases to which the same are applicable.

5. *Practice to continue, subject to these orders.*—The enactments, practice, and forms in force and used in the county courts shall, subject to the foregoing orders, be adopted with reference to proceedings taken under the before-recited act, so far as the same are applicable, *mutatis mutandis*.

6. *Power to revoke orders reserved.*—The above orders shall be in force until further orders shall be made under the act of the 18th and 19th Victoria, chapter 63, for consolidating and amending the law relating to Friendly Societies.

Dated this seventh day of November 1855.

(Signed) CRANWORTH, C.

INNS OF CHANCERY FORMING A SOLICITORS' COLLEGE.—A proposition is being discussed for associating all the inns of Chancery into one college of attorneys, and uniting them with the Incorporated Law Society.

BARRISTERS IN DISGRACE.—We are very sorry to say that very recently some cases of bad conduct on the part of barristers have occurred, amongst which may be mentioned one in which a committal took place for one month's hard labour for desertion of a wife and seven children, the husband at the same time living with another woman. A very suspicious case has also been reported with respect to Mr. Horry's clerk, who obtained 18s. for settling and engrossing an affidavit to be used at sessions.

PROFESSIONAL NEWS.

RESULT OF MICHAELMAS TERM EXAMINATION.—Though 188 candidates might have gone up for examination, 142 only completed their testimonials, and of these seven were absent on the morning of examination day, and one withdrew from illness, leaving 134 who actually underwent examination. Of these, 126 were passed, and nine only were postponed, which was a very small number compared with many examinations.

LAW LECTURES AT THE INCORPORATED LAW SOCIETY.—The lectures on law and equity are by Mr. J. T. Humphry, on conveyancing, by Mr. Baggallay; on common law and criminal law by Mr. Malcolm Kerr. The lectures commenced on the 2nd of November. For the three courses articulated clerks of members pay £2; to one course only they pay £1; other articulated clerks pay one-half more.

MR. BARBER.—The well-known Mr. W. H. Barber has at length succeeded in getting again on the Rolls both of the common law and equity courts, and it is to be supposed that his sufferings will have considerably quickened his capacity for detecting frauds of the nature of those for which he was tried, though he was not at any time considered to be deficient in that faculty and indeed his known cleverness was a main ground of suspicion that he must have been cognizant of the nature of Fletchers transactions.

ARTICLED CLERKS.—*Non-inrolment of assignment of articles*—*Time of calculation of service.*—The following case in the Court of Queen's Bench may be useful to some of our readers. Mr. Honeyman moved on part of a Mr. Daniel an articulated clerk, that the time of his service under an assignment of his articles might be calculated from the date, and not from the time of the inrolment of the articles. It appeared that this gentleman after having served a portion of his time with an attorney, was, in consequence of his master's retirement from the profession, assigned to another attorney. The assignment was duly executed and taken to the rule office, but in consequence of some words in the description of the clerk's residence being accidentally omitted, the assignment was not enrolled by the proper officer—an omission which was not discovered until the present time. The application was granted (*re Daniel*, 26 Law Tim. Rep. 80). We may remark, that the report is not very intelligible, and we should be glad to have the precise facts, as it may be useful to others, as we find there are mistakes continually occurring in respect of articles of clerkship. Solicitors, too, should remember that it has been decided that it is their duty to see the clerk's

articles property enrolled, and if they be not enrolled, no action would be for the premium (if not pre-paid, as it usually is) and perhaps the solicitor would be liable to the clerk.

EQUITY SITTINGS IN LINCOLN'S INN.—A correspondent of the *Times* of the 29th of November calls attention to the beneficial operation of what he not unjustly styles "a most important measure of law reform," which is due to the present Lord Chancellor, *viz.*, the transfer of the sittings of the equity courts from Westminster Hall to Lincoln's Inn. He adds: "It is, indeed, impossible to exaggerate its advantages which do not concern the bar alone, but are even more important to solicitors than to ourselves. Now, this long asked boon was conferred on the profession by the present Lord Chancellor, who sacrificed his personal convenience to that of the body over which he presides. In this his Lordship's example was imitated by the Solicitor-General, to whom it would have been most convenient to retain the courts at Westminster, as he is the leader in many of the cases before the House of Lords. The equity judges—a most amiable and considerate body of men—did not thwart the wishes of the profession; and, now that the experiment has been tried, who can point out a single disadvantage which has been occasioned? It was said that it was desirable to bring together, at stated periods, the common law and the equity bar, but I never could discover what professional or social advantage was to be obtained by the jaded equity draughtsman and conveyancer, through the accidental discovery, after a collision in some dark passage or staircase in Westminster Hall, that the little, ferret faced man, who had the next house last long vacation at Margate or at Broadstairs, was Mr. Oschner Plantagenet Brown, of the Home Circuit. I repeat, that the change is one for which we all are and ought to be sincerely thankful; and, in so saying, I believe that I am representing the feelings of the whole legal profession."

SUCCESSION DUTY.—It appears from a letter in the *Times* newspaper that great inconvenience is experienced by persons going to pay succession duty on account of there not being sufficient officers to attend to the business. It also appears that nearly every return is wrong, and has to be corrected, which throws great labour on the officers.

LIST OF CORRESPONDENTS.

The following are to be added to the Lists at pp. x, 96, xx: namely, Mr. W. A. Pearless, of East Grinstead; Mr. G. E. Pickering, of Aylesbury.

Mr. H. Hall (of Ashton-under-Lyne, p. x) wishes to discontinue correspondence.

JUSTICES OF THE PEACE.

"But is this law?
"Ay, marry, let; crowner's quest law."

THIS venerable functionary, who took upon himself to expound the law, had, according to the words of our immortal poet, been "sexton, man and boy, for thirty years," and was, we have every reason to believe, a great master of his important calling;—that he had a keen perception in sundry matters incident to his office is clearly shown—that he was a man possessed of a considerable degree of rough (not to say exquisite) humour is also evident from his colloquy with the *Prince of Denmark*. Thus he argues, with the subtlety of a special pleader:—

"Here lies the water; good: here stands the man; good: If the man go to this water, and drown himself, it is, will he, nill he, he goes; mark you that; but if the water come to him, and drown him, he drowns not himself: Argal, he that is not guilty of his own death, shortens not his own life."

Though there is here some cogent evidence of a judicial mind, we are not told in the subsequent history of this poor opinionative clown that Fortune placed him on the judgment-seat; no, we are left to conjecture that his attention was confined to interring the bodies of the dead, not imprisoning the bodies of the living—he had not the chances of a *Dogberry*, and consequently did not become a *Dogberry*.

But kind Fortune is not always at hand to interpose her aid; had she stepped into court on several recent occasions the name of Nathaniel Williams (now legibly entered in the Book of Martyrs) would be unknown beyond the limits of his little parish; nor would the names of many of the local magistrates of Worcestershire and of Windsor be enrolled amongst "the Dracos of the bench." However, let us not stop to dilate upon the doing of these notables; similar cases are now-a-days sadly too numerous to require their specific notice, and, were it otherwise, the recent admirable strictures of the press would be amply sufficient for our purposes. But, to be serious, the few remarks which it is our intention to make will not have reference to any specific instances, but will be confined to a few brief, though general, remarks upon the office of justice of the peace; and we need only assert, once for all, that they are offered without any disrespect to individual justices, who are only treated as forming part of a system. And, indeed, we are ready to join in the encomium of the Court of Queen's Bench, that "the unpaid justices of the peace are a class of persons to whom the country is under as great an obligation as this, or any other nation is, or ever was, to any member of its community" (Rex v.

Borrim, 3 Barn. and Ald. 433, and quoted by Sergeant Stephen and Mr. Warren, Q. C.). That in many instances they act according to the best of their ability—that there are many estimable persons filling the office, with honour to themselves and advantage to the community, and therefore deserve well of their country, we should be the last to contradict; but common truth forces us at the same time to add, that there are many (alas, too many!) who do not act up to their ability—many who have little or no ability—many who disregard the dictates of common sense and morality, and who pervert the justice which they swear to administer. And this should not be.

We know, upon high authority, that the first cause of a nation's wealth is the division of labour, and, as illustrating this position, Dr. Adam Smith points to the various processes resorted to in the manufacture of a pin. We may be excused for asking how the affairs of men would go on without this grand division? The shoemaker and tailor can only become masters of their several trades by having their attention exclusively directed to the practical operation of them, by being bound apprentice to these crafts, and made acquainted with them, from the manner of holding the needle upwards. Do not these reasons apply equally to our judicial polity? Should the education of the justice of the peace be less in proportion than of these humble artisans? Nay, should the justice be absolutely uneducated, totally ignorant of the duties of his calling? The time has arrived when the notion that the office of judge is an incident of property is no longer entertained. The first rudiments of law can only be learned by severe and constant study; by some it may be said that much art is not required for the due discharge of the duties of this particular office; it will suffice for the present to answer, that some art, some intelligence, is necessary; if it is difficult to fix the precise degree this must be conceded—that the magistrate should be a man of honest and sober life, of unspotted integrity—not one likely to pass directly out of his own courts into the company of the drunkard, or into the bankrupt or insolvent court; and not only should the moral character be free from blemish, but some degree of fitness and aptitude should be required as a guarantee for the due discharge of his duties.

But the question is, what degree? To put this qualification at its lowest possible point, men of average education should be appointed, who have no duties to discharge inconsistent with their judicial duties, whose antecedent life gives some earnest for their future usefulness. If only these were sufficient requirements, how many would be found wanting—men of narrow minds, of ignorant preju-

dices, possessed of local, family, and party interest inconsistent with the position of an independent magistrate—men more acquainted with the rude gossip of their hamlet than with the dictates of common sense or common justice; more accustomed to spend their leisure hours in the revelry of the tavern than in endeavouring to acquire any knowledge of the laws which they have sworn to obey and righteously to administer—men, in short, who, dressed “in a little brief authority,” bring much odium alike upon their office as themselves. Again, how many simple and inoffensive persons are there upon the bench who, by assuming a position for which, both by nature and education they are supremely unfit, subject themselves to the keen edge of satire—those who would be respected in their domestic retirement, and should be content without apeing “the justice,” without coveting the eminence of “Robert Shallow, Esquire, justice of the peace and quorum.” Is it not as ludicrous to appoint such an one a “justice and conservator of the peace” as it would be to choose your harlequin because he has bandy-legs, or your motly clown because he is a natural-born fool? Would that these big-bellied country squires, fond of their “sack” and midnight revels, were content with their own chairs, without occupying the chair in the town-hall, and continue to dispense therefrom their bounteous hospitality, instead of sending forth decrees that would pass muster amidst the fumes of the fragrant weed, but which, when exposed to severe criticism, would be deprived of all legal weight and moral power. We say all-hail! to these old English worthies—

“In fair round belly, with good capon lin’d,
With eyes severe, and beard of formal cut,
Full of wise saws and modern instances.”

But, though we say “all hail,” we assure them that we admire them more in their individual, their squirearchal, than in their judicial capacity. We admire Sir Roger de Coverley (that glorious creation of Addison) far more as the homely, happy, joyous knight in Coverley Hall, than as justice of the quorum in the Worcestershire Sessions-house, even when in the great act of rising from his seat in the presence of my lord judge “just to keep up his appearance in the county.”

Blackstone tells us most truly that, “it is a matter of supreme importance to beware of shaking the confidence of the humbler class in the administration of criminal justice”; what confidence has the public in the administration of justice by our unpaid magistrates, whose follies and foibles are so often the joke of the market-town? Should one of these worthy gentlemen hold it a *burglary* to kill a pheasant, as *Dogberry* thought it “flat perjury to call a prince’s brother villain,” the saying *will* out,

and the gibe and the joke *will* follow. Again, each justice has his own hobby-horse, or, as has been humourously said, “every magistrate has his own peculiar views of the enormity of offences”: one is the terror of vagrants, another of poachers, another of old apple-women, who unrighteously sell their fruit on a Sunday; some take the poor-house, some the ale-house, under their special supervision.” Having these “hobby-horses,” these gentlemen “sworn of the peace” deal some heavy blows with their magisterial cudgels upon the heads of the unhappy culprits. Then they have a clerk, who, if sufficient for the due discharge of the duties of his office, is entirely irresponsible; it is not often that his opinion is asked, or, if given unasked for, followed; he is but a satellite to the judicial corps to which he is attached, whose light is nearly extinguished by the effulgent blaze of his superiors in petty sessions assembled. Again, this clerk has a pecuniary interest in augmenting the number of the cases which come before the court, and by consequence the number of half-guineas which flow into his pocket. This alone is a great grievance which requires a remedy. But there are other reasons without number why these unpaid justices should be unrobed: they have to adjudicate upon cases in which servants, friends and relations are parties, and perhaps an unfortunate wretch who has made himself obnoxious to them, but he deals out his clumsy justice according to his own feelings of right and wrong, receives, rejects, and weighs the evidence, as best he can, comes to his own unaided conclusion, and rests satisfied with his determination as a perfect piece of logical reasoning and legal acumen. “Thus fools step in where angels fear to tread.” Should this *cheap* and *summary* judgment want uniformity it matters not, the law excuses the justice for his errors; there is no personal remedy, unless *malice* can be expressly proved; ignorance is no fault; and from the legal consequences of his own acts, *should no malice be proved*, the legislature has protected him. Even Lord Eldon would not remove a justice of the peace from his office, until he had been found guilty of some *crime*! Thus was he held sufficient for a criminal, ‘judge until he had been declared by the positive law a *criminal*!’ Never heed little matters; true, he may be daily committing before the eyes of his suitors the grossest immoralities, but he has been found guilty of no *legal crime*, hence he must remain. We cannot think that our present chancellors would be guided by such a rule; though expounded by so great a judge as Lord Eldon. Hitherto we have, perhaps, been taking a somewhat ultra and severe view of rural justiceship, a view which, we sincerely trust, applies to a small portion of their worships;

still, to be honest, there are many, we fear very many, who deserve to be severely treated, and that there should be any such allowed to remain to perform the functions of the office, is a national reproach. We know that human nature is liable to err, whether clad in ermine, or appearing in more humble guise. Many will be disposed to apply this as an answer to our reasoning, but surely it is none. When and where do we find one of our superior judges going wrong; those grave and upright magistrates are the admiration of the whole world. That in times long gone by there were instances of judicial delinquency we readily admit, but such instances are, happily, confined to records of the past; and, were the superior judges of our generation fail to act up to the exigency of the occasion once in a thousand times, the unpaid justices so fail, nine hundred and ninety-nine times in a thousand; the one is the exception, the other but too often the rule. And how, in the ordinary nature of things, can we reasonably expect it to be otherwise? Where is a remedy for all this wrong? We think it will be found in having professional magistrates appointed, with sufficient salaries to do the work of the unpaid justices; and this may be considered as the cardinal point of our argument.

We say, a judge should understand his business as a tailor or carpenter understands his (we use an homely illustration, as it is an homely subject); he should be able to work as well with his head as his calling as they are able to work with their hands at theirs; he should, like them, be required to do his work well, to be a master of his craft; and, like them, also, should be paid the full value of his labour. In this we conceive, lies the whole gist of the case: substitute a responsible magistrate for an irresponsible justice's clerk, and see the result; we may say emphatically, look "upon that picture and on this." What! are we required to spread the case with self evident matter, as you would spread your bread with butter; verily, verily, will not the justices of sessions, see the case as it actually is? Oh! it is hard to force from their grasp the office which men of their estates—worthy magistrates—have held since the time of the third Edward, when, going back through a long series of great-grandfathers, the honourable appellation of "justice" was acquired. "Gentlemen, for the good of the country; for the honour of the state, for the safe administration of public justice, it is required that you should resign the trust." It is deplorable to see a judge incompetent to discharge the duties of his office.—We think the only exception (and that a weak one) that can be taken to the establishment, or, rather, to the increase in the number of paid magistrates is the cost of their keep; but as a good horse is worth

his corn, so surely would a good magistrate be worth his salary; and without troubling to go into any calculation to shew that the establishment would be self-supporting, that expense, instead of being increased, would be diminished—we would rest upon the broader and more legitimate grounds, that it is the positive duty of the State to furnish a sufficient judicial establishment, and that it is the right of every offender against the laws to be adjudged by one qualified for his office by learning, integrity, and experience. The expense attending this altered system would be very disproportionate to the good which would inevitably result from the change. The pure and efficient administration of justice is always worth what it costs; thus it is said in "the Wealth of Nations;" "the salaries of all the different judges, high and low, together with the whole expense of the administration and execution of justice, even where it is not managed with very good economy, makes, in any civilized country, but a very inconsiderable part of the whole expense of government." To any who take an interest in this important subject, and who have never witnessed the manner in which the paid magistrates in London, Liverpool, and several other large towns (in which also we should include recorders of boroughs), discharge their onerous duties, we would say, "step into their court, and judge for yourselves," they will there see acute, far-seeing, thoughtful, and learned men in actual discharge of their different duties—men as conversant with human nature in all its various phases as with human laws, who not only look at, but *look through* the witnesses daily brought before them with a searching eye, probe them to the very core, and exhibit to the uninitiated the latent springs of iniquity and crime; they know the men by their haunts, their companions, their vile devices, and the visible workings of their fiendish minds, and, knowing them, they "hold the mirror up to nature," and administer with truthfulness, with justice, and with propriety, that meed of punishment which the law has wisely ordained. Again, as they know the baser so are they alive to the nobler, qualities of the mind; the disgust felt towards the brutal husband, does not lull to slumber, but rather stimulates into activity, sympathy for the brutalized wife and the suffering children. No, if the stern, but just, law hath ordained that the brute shall be handed over to condign punishment, the humane law of man's nature has contributed to the wants of the suffering and destitute; and from the same seat there goes forth to the one condemnation and disgrace to the other comfort and succour.

Thus is justice admirably administered by these learned gentlemen, whose movements are characterised by as much reason, uniformity, and judicial

correctness, as those of the judges of our superior courts.

Assuming, then, that the substitution of paid competent magistrates for unpaid incompetent ones is a "consummation devoutly to be wished," and, being so, that the system should be modified to carry it into successful operation; many different opinions would, no doubt, arise as to the means by which this should be accomplished, but we have only recently established a system of *civil* procedure in small matters, which is working much good throughout the kingdom, and which should afford encouragement, (if it is needed) to the introduction of some improvement into our system of *criminal* procedure in small matters. It would probably be a question whether an additional jurisdiction should be given to these judges in the latter province of our law, whether distinct judges should be appointed, or whether the office should be open to attorneys as well as barristers, or be confined to what Sydney Smith styles "that favourite of a Whig administration—a barrister of seven years standing," but these are minor points and matters of mere detail; only let the end to be aimed at be specifically agreed to, and the means to attain it would soon follow as of course; let there be a beginning, and time and experience will do the rest. In the meantime the subject for our consideration should be the necessity for the change, and we think there are abundant materials to conduct intelligent (we speak not of professional) minds to the conclusion that it is imperiously demanded. Hard, we know it is, to get rid of strong and deep-rooted prejudices, we little like to see ugly hard-faced railways cut through so many "sweet Aburns," to see picturesque lanes give place to steep embankments "of formal cut," and farm-yards transformed into railway-stations. But the stern uncompromising exigency of society has required it, and the verdict has gone forth; and what was beautiful in nature has yielded to what is wonderful in art. Oliver Goldsmith has given place to George Stephenson, and the Board of Romance, to the Board of Trade. We must bear to look upon stage-coaches and Aburn villages as things belonging more to the past than the present. Time will make far greater ravages, will, with his iron-hand, rudely grasp things yet untouched; still, the consolation is sweet that he pays largely for what he takes, and showers upon us benefits unlooked for as the changes he has wrought. That time, which has allotted to every man a special calling—has amused us in our childhood—assisted us to our manhood—supported us in our age—made and unmade kings and judges, tinkers and tailors, and which can make and unmake them still, will root out the "tares from the wheat"

remove the judicial *Dogberry* from his bench, send the *Justice Shallow* from the justice-seat to his parlour, and from his parlour to his grave—perhaps, alas! "with all his imperfections on his head," and place in their stead judges both upright and learned to uphold and vindicate the majesty of the law, keep the justice-seat the pride and admiration of all right-minded-men, from which will go forth justice tempered with mercy—mercy that

"—droppeth as the gentle rain from heaven
Upon the place beneath."

B. H. S.

THE BANKRUPTCY LAW.

(Continued from p. 155).

*Admission of debt by debtor to the bankrupt's estate—
Order on bankers, &c., to pay over monies, &c.—
Order of court as to payment of money and costs—
Surrender of bankrupt—Protection—Punishment for
not surrendering—Examination—Committal for not
answering.*

SUMMONING BANKRUPT'S DEBTORS.

Admission of debt by a debtor to the bankrupt's estate.—It has already been stated that by sec. 120 (set out *ante*, p. 154) of the Consolidation Act, a commissioner may summon before him any person supposed to be indebted to the bankrupt, and we may now add that by sec. 123, when any such debtor admits by his examination and also a separate admission that he is indebted to the bankrupt's estate, the commissioner may make an order for payment, which order is to have the effect of a judgment in the superior courts, and may be enforced accordingly. It is provided that an attorney must be present, and attest the debtor's signature, and that if part only of the sum claimed be admitted, the residue may be recovered by action. We may add, that by the 18 & 19 Vic. c. 15, s. 10 (set out 1 *Law Chron.* p. 428), no such order is to affect lands as to purchasers, mortgagees, or creditors until it shall be registered, and, when necessary, re-registered. The 123rd sec., and the admission and order therein referred to are as follows:—

"If any such person examined as last aforesaid shall, in and by his examination, signed and subscribed as aforesaid, and also in and by a separate writing in the form contained in the schedule X. to this act annexed, admit that he is indebted to the bankrupt in any sum of money upon the balance of accounts, it shall be lawful for the Court, if it think fit, to order (in the form contained in schedule Y. to this act annexed, or to the like effect), that such person shall forthwith, or at such time and in such manner as to the court may seem expedient, pay the amount so admitted, in full discharge thereof to

the official assignee, together with the costs of and incident to the summons of such person, if the court think fit to award costs, or the court may, if it think fit, in the said form contained in schedule Y. to this act annexed, order the official assignee to pay the costs of the person summoned out of the estate of the bankrupt; and every such order shall have the effect of a judgment in her Majesty's superior courts of common law, and may be enforced accordingly: provided always, that no such order shall be made unless there be present some attorney of one of the superior courts on behalf of the person making such admission, expressly named by him, or, upon his refusal to name such attorney, named by the court to act upon his behalf to inform him of the effect of such admission, before the same is signed and subscribed as aforesaid, and that such attorney do sign his name as a witness to such admission in the form contained in the schedule Y. to this act annexed: provided also, that if part only of the sum actually due be so admitted, or if the court make an order for part only of the sum admitted, the residue may be recoverable in the same manner in all respects as if no such admission or order had been made."

Admission of debt by debtor.—The following is the form referred to in the above section as the admission in the form contained in the schedule X. to be signed by a debtor to the bankrupt's estate; it is by mistake called "admission of a debt by a creditor of bankrupt" which we have altered to its correct form by substituting "debtor"

The Bankrupt Law Consolidation Act, 1849

Admission of Debt by Debtor of Bankrupt.

I, the undersigned I. K. of do hereby, in open court, confess that I am indebted to E. F. of a bankrupt, in the sum of upon the balance of accounts between myself and the said E. F.

(signed) J. K

Witness,

G. H. attorney of one of the superior courts, and named by the said I. K.

[or named by the court here] according to the Bankrupt Law Consolidation Act, 1849.

Order for payment of admitted debt.—The following is the form of the order to be made by the commissioners for payment of a debt admitted in court to be due to the bankrupt's estate, and is the form mentioned in sec. 123 as being schedule Y.

The Bankrupt Law Consolidation Act, 1849.

Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt.

Court of Bankruptcy, Basinghall Street, London, (or at in the county

of) day of A.D.
In the matter of a bankrupt.
Whereas of in his examination taken
day of and signed and subscribed by the said
has admitted that he is indebted to the
above-named bankrupt in the sum of upon the
balance of accounts between the said and the said
bankrupt: It is hereby ordered that the said
do pay to the official assignee of the estate and
effects of the said bankrupt, in full discharge of the sum
so admitted, the sum of forthwith [or if other-
wise, state the time and manner of payment], and
that the said do also pay to the said official
assignee the sum of for the costs of an incident to
the summons of the said in this behalf.

C. D. Registrar.

A. B., Commissioner.

If the court shall not adjudge the costs of and incident to the summons to be paid by the summoned, or if the court shall adjudge the official assignee to pay to the person summoned his costs, out of the estate and effects of the bankrupt, alter the form accordingly.

Order on bankers, Solicitors, &c., of bankrupt to pay and deliver over monies and securities.—We may here refer to sec. 132 of the act, by which the commissioner, after adjudication, is authorised to direct any banker, solicitor, &c., of the bankrupt, to pay or deliver over all monies or securities in their hands belonging to the bankrupt's estate. "After the adjudication of bankruptcy in any case shall have been advertised in the *London Gazette*, it shall be lawful for the court to order any treasurer or other officer, or any banker, attorney, or solicitor, or other agent of the bankrupt, to pay and deliver over to the official assignee, or to the Bank of England, to the credit of the accountant in bankruptcy, according to the rules which may be in force with respect to payment into the Bank of England of monies due to any bankrupt's estate, all monies or securities for money in his custody, possession, or power as such officer or agent, and which he is not by law entitled to retain as against the bankrupt or his assignees.

Assignees directed to pay over monies, &c.—By sec. 151 of the act the commissioner may direct the creditors' assignees to pay over all monies in their hands to the official assignees.

Rules of court as to orders for payment of money and costs.—The following rules of the 19th Oct. 1852 (vol. 1, p. 41), relate as well to orders for payment under the above provisions of the act as to orders for costs under sec. 249.

Order for payment of money or costs.—"Every order for payment of money and costs, or either of them, shall be signed by the commissioner making

such order, and be sealed with the seal of the court, and be countersigned by the registrar, or one of the registrars, and shall be forthwith filed with the proceedings."

Order for costs to contain leave to issue execution.—"Every order for payment of costs shall contain a direction that the party in whose favour the order is made may enforce the same by issuing execution."

Taxation of costs.—"The costs directed by any such order to be paid shall be taxed on production of an office copy of such order, and the allocatur being duly stamped shall be signed and dated by the master or registrar taxing the costs." See *supra*, 83, as to the taxation of costs.

Chief registrar to issue execution.—Rule 103. "In all cases where writs of execution may be issued out of the Court of Bankruptcy to enforce an order for payment of money and costs, or either of them, the same shall be sealed with the seal of the court, and be issued by the chief registrar on production of an office copy of the order for payment and [where the order comprises costs] on production of the allocatur."

Præcipes to be filed.—Rule 104. "That at the time of issuing any writ of execution the solicitor causing the same to be issued shall file a *præcipe* thereof with the chief registrar in the form given in the schedule to these orders." This form is as follows:—

SURREY. *Fi. fa., Ca. sa., Elegit, or Venditioni exponas* [as the case may be] against C. D. for payment of _____ and _____ costs [as the case may be] to A. B., official assignee of _____ [omit this if not applicable] on order of the Court of Bankruptcy in London [or for the _____ district]. Dated _____ day of _____ in the year of our Lord, 18

E. F. [solicitor issuing the writ.]

Address _____ Date _____

Præcipe book to be kept.—Rule 105. "The chief registrar shall file and keep every such *præcipe*, and shall keep a book in which he shall enter the same, with an index referring alphabetically to the names of the persons against whom writs are issued."

Forms of writs of execution, and of the execution thereof.—Rule 106. "These writs of execution shall be in the forms given in the following schedule, or as near thereto as the circumstances of the case may require, and such writs when sealed shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of common law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he doth or ought to execute such like writs, and for the execution of such writs such sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority

for the execution of the like writs issuing out of the superior courts of common law." As by the 15 & 16 Vic. c. 7, s. 6, power was given to levy the poundage fees and expenses of the execution over and above the sum recovered, it is presumed such fees and expenses would be leviable under these writs (see Wise's Com. Law Pro. Act, p. 147).

Tests and return.—Rule 107. "Writs of execution shall be tested in the name of the senior commissioner and of the day when actually issued, and be made returnable immediately after the execution thereof before the Court of Bankruptcy in London."

Indorsement of amount.—Rule 108. "The amount actually intended to be levied or extended, or for which the person is to be taken, and the name, occupation, and address of the person against whom the writ is issued, the name and residence, or place of business of the solicitor issuing the same, shall be indorsed on every writ of execution."

Venditioni exponas.—Rule 109. "On the filing of a return to a former writ that goods have been seized but not sold, a writ of *venditioni exponas* may be issued."

Returns to be filed with chief registrar and entered in præcipe book.—Rule 110. "On execution of the writ, or before execution, if so ordered by the Court of Bankruptcy in London, every writ shall be forthwith returned to the said Court of Bankruptcy, by filing the same [with the proper return indorsed] with the chief registrar, by whom such writ and return shall be filed of record, and the fact and date, and substance of the return, shall be forthwith entered in the *præcipe* book."

Entry of satisfaction.—Rule 111. "On satisfaction by levy or otherwise, in whole or in part, the party on whom the order is made may, on delivery of a search stamp, cause such satisfaction to be entered on the order for payment." The search stamp is one Shilling.

Rule 112. "Unless such satisfaction shall appear by the return of the writ, or shall be admitted by the party in whose favour the order shall be made, or his solicitor, application must be made to the Court of Bankruptcy wherein the proceedings and order shall be filed to order such entry of satisfaction."

Rule 113. "That the Court of Bankruptcy shall, on proper application, exercise such and the same powers of amendment of writs of execution, and the indorsement thereon, and the *præcipes* thereof in cases where such powers may be reasonably exercised, and on the same terms as to payment of costs or otherwise as the superior courts of Westminster are in the habit of exercising."

This rule having been issued subsequent to the Common Law Procedure Act, it is presumed it must

be read in connexion with the 222nd section, which enacts, that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defect and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties *shall be so made*."

BANKRUPT DELIVERING UP BOOKS AND ATTENDING ASSIGNEES — INSPECTION OF BOOKS BY BANKRUPT.

Bankrupt to deliver up his books of account, to attend assignees; he may inspect his books and papers — Attending the assignees after certificate, and payment for same.—Before we proceed to notice the subject of the bankrupt's surrender it will be convenient to state the provisions of sec. 105 of the Consolidation Act, which embraces several matters to which reference will hereafter be requisite, as the bankrupt's delivering up on oath his books of account and papers, his attending the assignees and assisting to make out the accounts of his estate, his inspecting his books and papers for the purpose of his examination, and attending the assignees after obtaining his certificate. The following are the terms of the 105th section:—"That forthwith after the insertion of the notice of adjudication in the Gazette or, if the bankrupt before the expiration of the time allowed for showing cause against the adjudication surrender himself and give consent to such insertion, forthwith after such surrender, the bankrupt shall (if thereto required by the official assignee) deliver up to the official assignee, upon oath before the court, or before a master ordinary or extraordinary in chancery, or justice of the peace, all books of account, papers, and writings relating to his estate in his custody or power, and discover such as are in the custody or power of any other person; and every bankrupt, not in prison or custody, shall at all times after such surrender attend the assignees, upon every reasonable notice in writing for that purpose given by them to him or left at his usual or last known place of abode, and shall assist such assignees in making out the accounts of his estate; and such bankrupt, after he shall have surrendered, may at all seasonable times before the expiration of such time as shall be allowed to him to finish his examination, inspect his books, papers, and writings in the presence of his assignees, or any person appointed by them, and bring with him

each time any two persons to assist him; and every such bankrupt, after he shall have obtained his certificate, shall, upon demand in writing given to him or left at his usual or last known place of abode, attend the assignees to settle any accounts between his estate and any debtor to or creditor thereof, or attend any court of record to give evidence touching the same, or do any act necessary for getting in or protecting the said estate, for which attendance he shall be paid 5s. per day by the official assignee out of his estate."

SURRENDER OF BANKRUPT.

Following as nearly as possible the order of the provisions of the Bankruptcy Consolidation Act, we now proceed to notice the subject of the bankrupt's surrender. We have seen that if the adjudication be not annulled the commissioner is by sec. 104 (see *ante*, pp. 44, 151, 152) to appoint two public sittings of the court for the bankrupt to surrender and conform. It is not to be inferred that the surrender is the only business of these two sittings, for at them the choice of creditors' assignees is made, debts are proved, and other matters connected with the bankruptcy are transacted. These two days are mentioned in the advertisement of the adjudication, and, as we have seen, the section expressly states (*ante*, pp. 44, 152) that the last of the two days shall be on a day not less than thirty days, and not exceeding sixty days, from such advertisement. The time is usually the sixtieth day.

Summons to bankrupt.—Though nothing more is said in the above section, it is usual to serve a summons on the bankrupt for the day mentioned in the advertisement; this arises from the provision in sec. 251 of the act, by which neglect to surrender at the proper time, "after notice thereof in writing to be served upon him personally, or left at the usual or last-known place of abode or business of" the person adjudged bankrupt, makes him guilty of a felony. The service of the summons is the most regular and satisfactory mode of proving the notice to the bankrupt. Besides which, as we shall presently notice, it is the document which secures to the bankrupt freedom from arrest.

Bankrupt's freedom from arrest.—In order to enable the bankrupt to make his surrender, and undergo the necessary examination as to his estate, an immunity is given to him from arrest for a certain period. This is by virtue of sec. 112 of the act, which, in the case of a bankrupt not already in custody, enacts: "That if the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this act limited for such sur-

render, and such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the court shall from time to time by indorsement upon the summons of such bankrupt think fit to appoint."

Bankrupt in prison.—If the bankrupt be in prison at the time of the meeting to surrender, he may be brought up to the bankruptcy court to surrender. Thus, by sec. 112 of the act it is enacted, that "whenever any bankrupt is in prison or in custody under any process, attachment, execution, commitment, or sentence, the court may, by warrant directed to the person in whose custody he is confined, cause him to be brought before it at any sitting, either public or private, and if he be desirous to surrender, he shall be so brought up, and the expense thereof shall be paid out of his estate, and such person shall be indemnified by the warrant of the court for bringing up such bankrupt."

Protection where bankrupt in prison—Release from custody.—As we have seen, where the bankrupt is not in prison at the time of the adjudication, and he surrenders and obtains a protection, that protection extends to the time of his finishing his examination, and it may be extended until his certificate is obtained. Where the bankrupt is in prison, having surrendered and obtained protection from arrest, the commissioner is empowered by sec. 112 to order his immediate release, either absolutely or upon such conditions as he shall think fit, which is not otherwise to affect the rights of the creditor. And the statute specifies certain cases in which this release is not to be ordered—namely, "provided always that the court shall not order such release where it shall appear by any judgment, order, commitment, or sentence under which the bankrupt is in prison or in custody, or by the record or entry of any such judgment order, commitment, or sentence, and the pleadings or proceedings previously thereto, that he is in prison or in custody for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy: provided also, that such release shall in nowise affect any rights of the creditor at whose suits the bankrupt may be in prison or in custody against the bankrupt, except the right of detaining him in prison or in custody whilst protected from imprisonment by order of the court."

Discharge of bankrupt where arrested after protection.—If a bankrupt is arrested whilst protected, the officer must discharge him on being shown the protection. This is by sec. 113, which enacts "that if any bankrupt shall be arrested for debt, or on any escape warrant in coming to surrender, or shall after his surrender and while protected by order of the court be so arrested, he shall on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shewn such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit to such bankrupt for his own use, the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit."

The protection ceases on the grant of a certificate, and does not extend to the time of the delivery of the certificate to the bankrupt (re Davis, 14 Law Tim. Rep. 109). The court has no power (see sec. 259) to grant protection after the refusal of a certificate (exp. Gibson, 21 Law Tim. Rep. 9).

Time for surrender—Taking surrender.—We have seen that sec. 104, speaking of the bankrupt's surrender, mentions "the day limited for his surrender," whilst the penal clause, sec. 251, which will be set out presently, speaks of the surrender of the bankrupt "upon the day allowed him for finishing his examination." A question has been raised, but not decided, with respect to the meaning of "the day limited for his surrender," and "the day allowed him for finishing his examination," in the first part of this section. The day limited for his surrender has been treated as the first of the two public sitting days mentioned in sec. 104, and the day "for finishing his examination" as the last of those two sittings. But sec. 104 expressly states that such last sitting shall be "the day limited for such surrender," and therefore the day allowed him for finishing his examination in sec. 251, may refer to an adjournment from that second day (see observations Cresswell, J., Reg. v. Hilton, 2 Cox, C. C. 329 n). If the bankrupt has surrendered at the one period or the other, he is not within the penal provisions of this section (per Erle, J., Reg. v. Kenrick, 1 Cox, C. C. 146).

If the bankrupt surrenders in due time, the commissioner signs a memorandum thereof, and indorses the bankrupt's summons with a memorandum of such surrender, the time for which, if necessary, and the commissioner thinks proper, is enlarged from time to time by a similar indorsement.

Punishment for not surrendering in due time.—If a

bankrupt does not duly surrender in time, the commissioner signs a memorandum to that effect. The effect of this is that the bankrupt is liable to be prosecuted as a felon, and punished by transportation for fourteen years. This is by sec. 251 of the Consolidation Act, which enacts "that if any person adjudged bankrupt shall not upon the day limited for his surrender, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing, to be served upon him personally, or left at the usual or last known place of abode or business of such person, or personal notice in case such person be then in prison, and notice given in the *London Gazette* of the issuing of the fiat, or filing of the petition for adjudication of bankruptcy against him, as the case may be, and of the sittings of the court (having no lawful impediment proved to the satisfaction of the court at such time, and allowed by the court by a memorandum thereof then made on the proceeding), surrender himself to such court, and sign or subscribe such surrender, and submit to be examined before such court from time to time, every such bankrupt shall be deemed guilty of felony, and be liable to transportation for life, or for such term not less than seven years as the court before which he shall be convicted shall adjudge, or shall be liable to imprisonment, with or without hard labour, for any term not exceeding seven years." When the bankrupt is in prison at the time he ought to surrender he is not bound to give notice to the commissioner; and though the bankrupt, so being in prison, neither surrender nor apply to enlarge the time for his so doing, or to be brought up to surrender, he is not, it seems, guilty of felony, and that though his detention is collusive (*Rex v. Michell*, 3 Car. and P. 251; *Archb. Bank* 262, 8th edit.). The above case, however, was decided on the corresponding section (112), of the statute 6 Geo. 4, c. 16, which did not contain the words "having no lawful impediment proved to the satisfaction of the court at such time, and allowed by the court by a memorandum thereof then made on the proceedings."

It is generally for the benefit of the creditors that a bankrupt should be permitted to surrender, although the prescribed period has passed, and where the commissioner, on the ground that the bankrupt had left England under unfavourable circumstances, had refused to give such permission, the Vice-Chancellor, although declining to interfere with the decision of the commissioner, recommended the assignees to accede to an appeal from this refusal, and upon their consent the permission was given, the bankrupt's friends paying all the costs (*exp. Grant*, 4 De Gex and Sm. 51. And see *exp. Atkinson*, *Ibid.* 62).

The indictment must also allege a service of notice on the bankrupt in one of the ways mentioned in the section (*Reg. v. Kenrick*, 1 Cox, C. C. 146). And as the words "with intent to defraud his creditors," overrule the whole of the section, there must be an averment that the non-surrender was with that intent (*Reg. v. Hill*, 1 C. and K. 168; *Reg. v. Hilton*, 2 Cox, C. C. 318), and some evidence should be adduced to prove it (*Reg. v. Hilton*, *suprà*).

The offence of not surrendering is committed at the place where the court is situate, and must, therefore (in the case of a district court), be tried in the county where the court is situate, and not in which the bankrupt resided or committed the act of bankruptcy (*Reg. v. Milner*, 2 C. and K. 310), but the offence of concealment may, it seems, be tried in any county where an actual concealment can be proved (see *Reg. v. Evani*, 1 Moody, C. C. R. 70).

Where on an indictment for not surrendering to a district court it appeared that the summons was, to appear before the commissioners of that court, and that the court was presided over by two commissioners who practically held two courts, it was held that proof that the bankrupt did not appear pursuant to the summons at the court, nor before one of the commissioners elsewhere, was sufficient to support the indictment without any proof that he had not appeared before the other commissioner elsewhere. (*Reg. v. Dealtry*, 1 Den. C. C. 287; 2 C. & K. 521; 2 Cox C. C. 428).

An indictment against a bankrupt under this sec. for not discovering when he disposed of his real and personal estate, must allege that the bankrupt had in fact disposed of it, and it is not sufficient merely to allege that he was possessed of real estate, and that at his examination he did not discover when he disposed &c., of it. (*Reg. v. Harris*, 1 Den. C. C. 461; 19 L. J. 11 M. C.). An indictment for that offence must shew that the party had become a bankrupt. (*R. v. Jones*, 4 B. & Ald. 845), and should also, it seems, contain a positive averment, that the bankrupt was examined. (*Reg. v. Harris*, *suprà*).

Although the advertisement in the *London Gazette* is (under sec. 283) evidence of the bankruptcy and fiat as against the bankrupt in criminal cases where the bankruptcy has not been disputed (*Reg. v. Hilton*, 2 Cox, C. C. 318), it is not evidence as against third parties indicted for aiding and abetting the bankrupt in the commission of offences under this section (*Reg. v. Harris*, 4 Cox, C. C. 140). And even against the bankrupt himself, before the *Gazette* can be admitted as evidence, it must be shewn as a condition precedent that he had not taken any step to dispute the bankruptcy, as mentioned in sec. 233 (*Reg. v. Harris*, *suprà*). It has been suggested, however, that the adjudication by

the Court of Bankruptcy, being a court of record, must be taken as sufficient evidence of the bankruptcy (see per Pollock, C. B., Reg. v. Hilton, 2 Cox, C. C. 325; and see *Rex v. Raphael*, Manning's Index, p. 232).

Refusal to answer, or not fully answering, or refusing to sign examination.—The bankrupt and his wife are not required to be sworn, but they must sign a declaration, the form of which is given in schedule W. to the act, and sec. 260 gives power to the commissioner to commit the bankrupt, his wife, or any other person (for the section is not confined to the examination of the bankrupt and his wife) if the former two refuse to make and sign such declaration, or the latter refuse to be sworn, or any of them (such appears to be the sense and purpose of the section), refuse to answer, or do not fully answer, any lawful question, or, without lawful excuse, refuse to sign the examination, or produce books and papers. The party remains in prison until he submits to be sworn, to make full answer, and sign and subscribe his examination, or produce the books and papers. Sec. 254 of the act provides that the wilfully and corruptly giving of false evidence shall subject the husband or wife, or other party, to the penalties of wilful and corrupt perjury. The following are the provisions of sec. 260:—

“That if any bankrupt, or the wife of any bankrupt, shall refuse to make and sign the declaration contained in Schedule (W.) to this act annexed, or if any other person shall refuse to be sworn, or shall refuse to answer any lawful question put by the court, or shall not fully answer any such question to the satisfaction of the court, or shall refuse to sign and subscribe his examination when reduced into writing (not having any lawful objection allowed by the court), or shall not produce any books, papers, deeds, writings, or other documents in his custody or power, relating to any of the matters under inquiry, which such bankrupt, wife of the bankrupt, or person is required by the court to produce, and to the production of which he shall not state any objection allowed by the court, it shall be lawful for the court, by warrant, to commit such bankrupt, wife of such bankrupt, or other person, in London to the Queen's Prison, or in the country to such prison as such court shall think fit, (as the case may be in London or in any district in the country), there to remain without bail until he shall submit himself to such court to be sworn, and full answers make to the satisfaction of such court to all such lawful questions as shall be put by the court, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents in his custody or power, to the production of which no such objection as aforesaid has been allowed.”

NOTICES OF NEW BOOKS.

STEPHEN'S LUSH'S COMMON LAW PRACTICE.

Lush's Practice of the Superior Courts of Common Law at Westminster, in Actions and Proceedings connected therewith over which they have a Common Jurisdiction: with Forms; also, Introductory Treatises respecting Parties to Actions; Attorneys and Town Agents; Suing in Person, by Attorney, or in Forma Pauperis, &c. And an Appendix, containing the General Rules, the Authorised Table of Costs, Fees, &c. Second edition. By JAMES STEPHEN, of the Middle Temple, Barrister-at-Law, and Professor of English Law at King's College, London. London: Butterworths.

It might seem at first sight that the above title would serve to give the reader a pretty good idea of the subjects embraced in the work and its contents, but when we state that the volume is of very large bulk, containing upwards of 1,000 closely printed pages, it will be readily understood that some further information is due alike to reader and author. The former may perhaps think such a volume scarcely required now that the practice has been so recently and so greatly remodelled, and is to be found within the compass of two acts, of which the latter is but a short one. But, on reflection, it will be apparent that nothing less than a considerable volume is required to do justice to the subject, for it is necessary that the writer should point out what portions of the former practice are still applicable to or even unaffected by the recent enactments. For it must be borne in mind that the two statutes above alluded to do not contain the whole practice, but, as usual with us, they merely introduce some new provisions, leaving the old rules, where not expressly superseded, to have their operation. The appearance of so large a volume as the above need not, therefore, alarm the profession, and, indeed, should be accepted as evidence of the author's desire not to shirk the labour necessarily thrown on him by so large a production. It must, too, be borne in mind that the above work is not confined to mere practice, for it has an introduction extending over upwards of 200 pages, the greater part of which is not usually embraced in books of practice. There can, however, be no doubt that the matter contained in the introduction forms a very useful feature of the volume. This introduction is the part of the original work of Mr. Lush which has undergone least alteration, but a very cursory perusal of it enables us to say that Mr. Stephen has carefully noted up the recent decisions, and referred to the late statutes relating to bankruptcy and insolvency. The introduction contains a treatise upon the very important

subject, the proper parties to actions as affected by the several events of bankruptcy, insolvency, marriage, and death of the parties having a right to sue or being liable to be sued, and explains the rights and liabilities which arise out of contracts of every description, and illustrates the rules which direct who, as between the original or substituted parties, is the proper person to enforce the right, or to sustain the liability; and the same course is pursued with reference to rights and liabilities arising out of torts, or wrongs independent of contract. And this treatise is preceded by a chapter on the jurisdiction of the superior courts of law at Westminster, and by another chapter showing in what cases an action is not maintainable by reason of personal disability. One of the questions preliminary to an action is, by whom the proceedings are to be conducted; and this involves a consideration as to who may and who cannot sue in person, and who may and who must sue by attorney, or by prochein amy or guardian, as well as the right of a cestui que trust to sue in the name of his trustee. Each of these considerations forms the subject of a separate chapter. Then follow chapters as to the power of suing in *forma pauperis*; as to the law of attorneys, embracing their qualifications, duties, liabilities, rights and privileges, the delivery and taxation of their bills, and the remedy for their costs; as to the duties, rights, and liabilities of town agents, both as regards their immediate employers, and the client; and lastly, as to general course of the business of the courts at Westminster. We then come to that part of Mr. Stephen's volume devoted to the practice of the courts, properly so called, which has thus been disencumbered of much that is preliminary, is divided into three books. The first exhibits the regular proceedings in an ordinary action, from the issuing of the writ of summons to execution, and from thence to the final affirmation or reversal of the judgment by the House of Lords. The second book consists of separate treatises upon different subjects of practice, collateral to but generally connected with the course of an action, and including the lately established procedure as to a claim of a writ of mandamus or injunction, as to equitable pleadings, discovery, interrogatories and the other improvements in the practice of the common law which have been introduced in the last few years. And the third and last book is taken up with the proceedings in the particular actions of ejectment and replevin, and the new summary procedure on bills of exchange, arbitration, prohibition, and county court appeals. Throughout the work forms are interspersed, but rather by way of illustration than as intended to form a collection of precedents; the statutes and rules of court are quoted verbatim; and

authorised tables of costs and fees, and forms of writs and other proceedings, are given by way of appendix. The above summary statement of the contents of the volume scarcely gives a full notion of the various subjects noticed by the author, but our space will not permit us to state the various heads *in extenso*. Indeed, we feel we cannot do better than let the author speak for himself, which we do by presenting some extracts from the work, the first being from the introduction, and from that part of it which treats of the parties to be defendants in actions *ex contractu*, so far as relates to husband and wife; and we have selected this as being the shortest, and at the same time a complete subject—the side and foot notes, which in the work are at the side and bottom of the page, we have introduced in the body.

"Liability of the husband by reason of agency in law.—

A husband being bound, by the contract of marriage, to supply his wife with food, clothing, and habitation to the extent of his ability, if he fails himself to do so, the law holds that he has made her his agent *pro hac vice*; or, in other words, implies a contract on his part to pay to any person who supplies her, the value of such necessaries as are suitable to her condition in life. Hence, whether he actually turns her out of his house, or whether she quits by reason of personal cruelty (*Emery v. Emery*, 1 Y. and J. 501), or under a fair apprehension of violence (*Houlston v. Smith*, 8 Bing. 127), or because the husband brings another woman into the house (*Aldis v. Chapman*, 1 Selw. N. P. 262, 7th edit.); if a stranger takes her in, or supplies her with suitable necessaries, the action for the price of them, or the cost of her maintenance, should be brought against the husband, for none will lie against the wife, she being unable to contract on her own account. This is the only instance of what may be termed, by way of distinction, an agency *in law*. In all other cases of liability, whether as husband, parent or master, the agency is a question of fact.

*"Action for necessaries supplied to wife living separate.—*To sustain an action of this nature against the husband, the plaintiff must prove, 1st: That the wife was wrongfully left destitute of any provision (*Reed v. Moore*, 5 C. and P. 200; *Mainwaring v. Leslie*, 2 C. and P. 507; *Clifford v. Laton*, 8 C. and P. 15; *Bird v. Jones*, 3 M. and R. 121; *Edwards v. Towells*, 5 Man. and Gr. 624); and 2nd, That the goods supplied were suitable to her condition in life, and were in fact necessary. As to the first of these requisites, if she quits him of her own accord, and without reasonable occasion (*Etherington v. Parrott*, 2 Lord Raym. 1006; *Horwood v. Heffer*, 8 Taunt. 421), or refuses to return to his house after a reasonable offer (*Reed v. Moore*, 5 C. and P. 200), or was put away for adultery (*Govier*

v. Hancock, 6 T. R. 603; Ham v. Toovey, 1 Selw. N. P. 259, 263, 7th edit.), the action will fail. So if living apart, the wife has a sufficient maintenance, whether of her own property (Clifford v. Laton, 3 C. and P. 15; Lidlow v. Wilmot, 2 Stark. 86), or by the allowance of her husband, he is not liable (see Turner v. Rookes, 10 A. and E. 47; Holder v. Cope, 2 Car. and Kir. 437). It has been held, that where goods are supplied to the wife while living apart with the husband's assent upon an allowance, he is bound, if he promise (subsequently to the delivery of the goods) to pay for them (Hornbuckle v. Hornbury, 2 Stark. 177; Harrison v. Hall, 1 M. and Rob. 85), but this proceeds probably on the ground that such promise affords evidence of the allowance being insufficient; or it may be on that of a recognition of the wife's agency. It is immaterial whether the person giving credit had notice of the allowance or not (Reeves v. Conyngham (Marquess of), 2 Car. and Kir. 442), or that he had no notice from the husband not to trust (see Spreadbury v. Chapman, 8 C. and P. 371); the right to recover is founded on the wife's necessity, and it is incumbent upon those who supply her to ascertain the fact (Mizen v. Pick, 3 Mee. and W. 481; contra Rawlings v. Vandyke, as reported in 3 Esp. 250). If the parties be separated under a divorce *a mensâ et thoro*, with a decree for alimony, and the husband omits to pay the alimony, he is liable for necessary supplies (Hunt v. De Blaquiere, 5 Bing. 550); so if he neglects to pay a stipulated allowance, he becomes liable to an action for necessities (Nurse v. Craig, N. R. 148).

"What are 'necessaries.'—As to the goods being necessities, the plaintiff must prove both that the articles supplied were such as are, in general, requisite to the comfortable subsistence of persons moving in the station of the defendant; and that they were also necessary in the particular case. The word 'necessaries' does not comprehend things which are merely ornamental; but it is not confined to articles of subsistence. The expenses incurred in exhibiting articles of the peace against himself, if necessary for his wife's protection, are chargeable upon the husband as much as her food and raiment (Shepherd v. Mackoul, 3 Camp. 326); and he has been held liable for defending her on an indictment for keeping a disorderly house, which she had kept with his concurrence, he knowing that she was so defended (*Ibid*). But he is not liable to the costs of an indictment preferred by the wife against him for illtreatment, for this, as a vindictive measure, cannot be necessary (Grindell v. Godmond, 5 Ad. and Ell. 755; Williams v. Fowler, M'Clel. and Y. 269). In one case, the husband was held liable to an attorney for the costs of exhibiting articles of peace

on behalf of the wife against himself, though they had been separated for many years, and the wife had an ample separate income; the court holding that when, by his own violence, he compels his wife to have recourse to the protection of the law, he makes the work and labour a necessary, and cannot be exempted from liability on account of the fact that the wife possesses a separate maintenance (Turner v. Rookes, 10 A. and E. 47).

"*Liability of husband by reason of agency in fact.*

—In all cases which do not come under this agency *in law*, the husband is liable only by reason of his assent, either express or implied (Manby v. Scott, 1 Sid. 109; see Atkins v. Curwood, 7 C. and P. 756), and the particular question is, was the wife the husband's agent in the transaction: and if she was, then was the credit given to her or her husband. Where goods are ordered by the wife and furnished for the necessary supply of the house and maintenance of the family, the agency is presumed; and it lies on the husband to show that they were furnished under such circumstances that he is not liable to pay for them (Clifford v. Laton, 3 C. and P. 15; Montague v. Espinasse, 1 C. and P. 356). And here the same rule applies as between master and servant (*vide post*, p. 61). If the husband has been in the habit of paying for goods purchased by his wife on credit, that will be evidence of a continuing agency, and to avoid future liability he must give notice to the persons with whom he has so dealt that he will not be answerable any more (see M'George v. Egan, 5 B. N. C. 196). Where the husband quitted his home on account of his wife's adultery, but left her with two children, bearing his name, in the house, and without giving notice or making any provision for them, he was held liable for necessities furnished to her for them afterwards, though she continued living in adultery (Norton v. Fozan, 1 B. and P. 226). But if the tradesman supplying them had been proved to have been cognisant of all the circumstances, he would not, of course, have been entitled to recover (*Ibid*). Where the parties were separated, the wife living in Yorkshire and the husband in London, and the latter was proved to have been in the house of the wife about a fortnight, and joined with her in giving receipts to her lodgers, it was held a question for the jury whether he had adopted the contract of the wife so as to be liable for the rent of the house (Barnes v. Jarrett, 2 Jur. 988). Again, if the wife be supplied with articles not necessary or suitable to her station, the plaintiff must prove the husband's assent, by showing that he saw the particular goods in use, or otherwise knew of the dealing, for he assents to the contract if, having any control over them, he does not cause them to be returned (Waithman v. Wakefield, 1

Camp. 120). It is immaterial whether goods supplied with his assent are necessaries or not; the distinction is only important as it turns the onus of proof on the one side or the other (see *Seaton v. Benedict*, 5 Bing. 28; *Montague v. Benedict*, 3 B. and C. 631; *Montague v. Espinasse*, 1 C. and P. 356; *Freestone v. Butcher*, 9 C. and P. 643; *Lane v. Ironmonger*, 13 Mee. and W. 368; *Reid v. Teakle*, 13 C. B. 627). And in a recent case it was laid down, that the fact of the wife having, without her husband's consent or knowledge, ordered a variety of articles of clothing from different tradesmen, concurrently with receiving from him a sufficient allowance for dress, rebutted the presumption of his assent arising from their cohabitation (*Renaux v. Teakle*, 8 Exch. 680).

"Credit given to wife.—Moreover, though the husband be proved to have seen the wife in possession of the goods, he is not liable if it appears that they were supplied on the wife's credit. Where, therefore, the tradesman took from the wife her promissory note for the price, it was held that the husband could not be charged (*Metcalf v. Shaw*, 8 Camp. 22). And where it appeared from the whole transaction, and the course of dealing between the parties, that the creditor intended to look to the wife for payment, the husband has been held not liable (*Bentley v. Griffin*, 5 Taunt. 356). There appears to be no distinction in such cases between goods which come under the description of necessaries and others. Again, where a wife obtained goods by falsely and fraudulently representing herself to be a feme sole, it was held that no action could be maintained against her husband (*Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422. In this case the action was brought against the husband and wife for the tort committed by his wife, and it was held that the declaration, even so framed, could not be supported, for the fraud was directly connected with a contract; and see *Cooper v. Witham*, 2 Lev. 247).

"Duration of the husband's liability.—It may be observed that the husband's liability has been recently established in reference to the decent interment of a wife from whom he was separated (*Ambrose v. Kerrison*, 10 C. B. 776; *Jenkins v. Tucker*, 1 H. Bl. 91), and for necessaries supplied to her during the period of his own lunacy (*Reed v. Legard*, 6 Exch. 636); for in the first instance the contract of marriage raises a legal duty at his hands required by common decency; and in the second the same contract clothes her prospectively with authority to pledge his credit for her support. But the liability of the husband, depending altogether as it does on agency either in law or in fact (It is to be remarked that the liability cast by the law on a man

under certain circumstances, to pay for goods supplied to a woman *passing* for his wife, depends entirely upon his having authorised her to act as his agent, which authority must be shown by the plaintiff to the satisfaction of the jury. See *Munro v. De Chemant*, 4 Cowp. 219; *Blades v. Free*, 9 B. and C. 167; *Ryan v. Sams*, 12 Q. B. 460) ceases when the tie of marriage is itself dissolved, which disruption operates as a revocation of the agency. And if, after such revocation, the widow contract as his agent, she must herself be sued, or if that cannot be from the circumstances of the case, there will be no one liable (*Smout v. Ilbery*, 10 M. and W. 1; and see *Blades v. Free*, 9 B. and C. 167; *Campanari v. Woodburn*, 3 W. R. (C. P.) 59)."

From that portion of the work which relates to the practice we give a short extract from the chapter which treats of pleadings subsequent to the plea:—

"General form of an issue.—The issue consists of a fair entry on paper of all the pleadings in the cause—demurrers included, whether they have been argued or not (*Ferguson v. D'Arcy Mahon*, 2 Jur. 820)—ranged under their respective dates. The following general form for an issue is supplied by a schedule annexed to the General Practice Rules of Hilary Term, 1853 (Forms of issues where judgment in default of a plea has been signed against one of several defendants—and where the plea of the defendant is an answer to part only of the matter charged in the declaration—are given in *Chitty's Pr. Forms*, ch. xx). But in reference to this schedule it is to be noticed, that, though the forms of proceedings therein contained may be used in the cases to which they are applicable (with such alterations as to the nature of the action, the description of the court in which the action is depending, the character of the parties or the circumstances of the case, may render necessary), any variance therefrom, not being in matters of substance, shall not affect their validity or regularity:—

"In the Q. B. [or "C. P.," or "Exch. of Pleas," as the case may be]. The day of , in the year of our Lord 18 [date of declaration].

"(The Venue). A. B., by P. A., his attorney [or in "person," as the case may be, and as in declaration], sues C. D., who has been summoned to answer the said A. B. by virtue of a writ issued on the day of , in the year of our Lord 18 [the date of the first writ], out of her Majesty's Court of Queen's Bench (or "C. P.," or "Exch. of Pleas," as the case may be), for [&c., copy the declaration from these words to the end, and all the pleadings, with their dates, writing each plea or pleading in a separate paragraph, and numbering the same as in the pleadings delivered, and conclude thus:] Therefore let a jury come, &c."

"Issues both of law and of fact."—Where there are also issues in law (vide post, in tit. 'Demurrer') to be tried after the issues in fact, insert at the end of the pleadings, including the demurrer and joinder, as follows :—

"And because it is convenient and necessary that there be but one taxation of damages in this suit; therefore, as well to try the said issue [or "issues"] above joined between the said parties to be tried by the country as to inquire what damages the plaintiff hath sustained by occasion of the premises whereof the said parties have put themselves upon the judgment of the court, in case judgment should happen to be thereupon given for the plaintiff, let a jury come, &c."

"Suggestions."—It may happen to be necessary to make upon the issue (or else upon the actual roll or record of the proceedings) some suggestion to the court of an event which has occurred since the commencement of the action, or of some fact which ought to be formally brought before the court and placed on the record—as, for example, that a judgment in default of appearance has been obtained against one or more of the defendants (vide sup. p. 256)—that it is convenient that the action (local in its nature) should nevertheless be tried in a county other than that in which the venue is laid (vide sup. p. 279)—that the plaintiff has failed to proceed to trial, although duly required so to do (15 & 16 Vic. c. 76, s. 101)—that the plaintiff or person entitled to proceed with the action by virtue of the Common Law Procedure Act, 1852, where the action would otherwise have abated by death, has made default in so doing (vide sup. pp. 49, 105)—that one or more of the plaintiffs or defendants (the cause of action surviving) has died (vide sup. pp. 48, 104. See also *Barnewall v. Sutherland*, 1 L., M. and P. 159; *Larchin v. Buckle*, *ib.* 740; *Pinkus v. Starch*, 5 C. B. 474)—that a sole plaintiff or sole surviving plaintiff has died, the suggestion in this case being made by his legal representative (vide sup. p. 48)—that a sole defendant or sole surviving defendant has died (vide sup. p. 104)—that the sovereign has died, and the like. In these cases the suggestion must be framed in accordance with the facts, and the memoranda inserted between, or before or after the pleadings, according to their respective dates. As a general rule, it is not competent for the opposite party to *traverse* them, but if untruly made, his course is to apply to the court or a judge to order that the suggestion be set aside. Moreover, in suing upon a *bond* under the provisions of 8 & 9 Will. 3, c. 11, there must be suggested on the issue delivered to the defendant the breaches on which the plaintiff intends to rely (so as to limit the amount of damages he is entitled to recover),

unless particulars of such breaches have been already delivered with the declaration (see *Webb v. James*, 1 D. P. C., N. S., 36; *Ethersey v. Jackson*, 8 T. R. 255; *Hompfrey v. Rigby*, 5 M. and S. 60. If the defendant has suffered judgment by *nil dicat*, or on judgment for the plaintiff on demurrer, then the breaches must be suggested on the *roll* before final judgment; the truth of each of which must be inquired into before the sheriff and the damages assessed by the verdict of a jury). The commencement of a suggestion may be as follows :—

"And the plaintiff [or "defendant"] suggests and gives the court here to understand and be informed that (&c., according to the facts)."

Plaintiff makes up the issue.—It is the plaintiff's duty to carry the cause to trial, and consequently to make up and deliver the issue, which he may do as soon as the pleadings are concluded by issue having been joined on all the pleas; and if he fails to do so within the time allowed by the practice of the court, the defendant may try the cause by *proviso* (vide post, in tit. "Trial by Proviso"); or he may (after giving a twenty days' notice to the plaintiff) suggest on the record that the plaintiff has failed to proceed to trial, and sign judgment for his costs in the manner hereinafter more particularly explained (vide 15 & 16 Vic. c. 76, s. 101, et post). If there are several defendants appearing by several attorneys, a copy of the issue should be delivered to each (*Tidd*, 725, 9th edit.). If the issue delivered be defective, the plaintiff should apply to amend it, and not deliver another (*Ethersey v. Jackson*, 8 T. R. 255).

"Amendment of issue."—Any substantial variance between the issue and the pleadings and other proceedings will render issue itself and all subsequent proceedings in action founded thereon irregular and liable to be set aside, unless amended, or unless the objection be waived. But appearing at the trial (without taking exception) is a waiver of any variance between the issue and the proceedings, provided the record itself be correct. The defendant, therefore, should apply to a judge at chambers to set aside or amend the issue at the costs of the plaintiff; and, on the other hand, if the plaintiff discover that he has made an error, he should apply to be allowed to amend (see as to the terms of amendment, *Fergusson v. Mahon*, 2 Jur. 820; *Worthington v. Wigley*, 5 D. P. C. 209; *Ikin v. Plevin*, *ib.* 594; *Emery v. Howard*, 9 Mee. and W. 108; *Cooze v. Neumegen*, *ib.*, 290; *Doe v. Cotterell*, 1 Ch. 277; *Anon.*, *ib.*, 277 a; *Codrington v. Lloyd*, 1 P. and D. 157; *Dennett v. Hardy*, 2 D. and L. 487)."

We have already exceeded our usual space, otherwise we should have liked to present an extract

from those portions of the work relating to the entirely new heads of practice, as Inspection and Discovery of Documents—Interrogatories for the Examination of the Parties—Equitable Pleas and Replications—Claims of Writ of Mandamus and of Writ of Injunction—Summary Procedure on Bills of Exchange. The mention of the last head reminds us to inform our readers that the work is brought down to the present term, and this is shown throughout the work, as will be seen on inspection, and we may add that the late act as to bills of lading is stated and noticed. The appendix of statutes and rules of court, &c., will be found extremely useful for reference, and the space occupied by them will not be grudged by the practitioner.

We have looked through the work with a view to test its accuracy in several respects, and we have found it quite correct and very satisfactory, but, of course, it is possible that, among the 1,000 pages there may be some slight error, though, if we may judge from what we have tried we should feel doubtful whether anything of importance has been mis-stated. We should mention that the 1,000 pages in reality present no just idea of the quantity of matter in the volume, for the smallness of the type has enabled nearly as much to be got into a single page as ordinarily is to be found in two pages of other works. It should be added, too, that the notes throughout the work are numerous, and present very often much information in a very compact form.

In conclusion, we can assure our readers that Mr. Stephen has improved those portions of the work which were originally the production of Mr. Lush, and has ably and correctly stated the present practice of the common law courts, and in so doing he has felicitously combined the enactments of the two procedure acts with those portions of the former practice which have not become obsolete, and has thus produced a work which is a complete text-book of the actual practice, and is invaluable to the practitioner and the student; indeed, we know not where the latter could find so *readable* a book on subjects ordinarily so little inviting as points of practice—at the same time that the work furnishes all that the busiest practitioner could desire. The result is due to the evident care and pains which have been bestowed by Mr. Stephen on the whole contents of the volume.

A Lecture on the Benefits of Mechanics' Institutions. Delivered to the Wimborne Minster Society for the Acquirement of Useful Knowledge. By W. F. FREEMAN. Wimborne: A. Purkess.

WE have long thought that lawyers do themselves

great injustice by not putting themselves forward in the now prevailing question of education, so as to give themselves a position in the eyes of the public equal, at least, to that sustained by the members of other professions. We have now in our possession a lecture delivered in America by a professional man upon the subject of law, composed to suit the popular taste, and at the same time sustaining the character of the profession on that true basis, its utility to the public generally. Before long we shall favour our readers with this lecture.

Accident having thrown in our way the printed copy of an address to a mechanics' institute by a solicitor and an old correspondent, we are induced to devote a brief space for an extract, the principles referred to in which may be profitably applied by doubtless many of our readers. The address has been printed, and it appears to us to have deserved it, and we think its tone and style will be found just suited to the object in view. In saying this we mean no slight praise, for we know by experience how difficult it is for the professional man to deal with lighter topics in the manner required to make them palatable to a mixed audience.

"The acquirement of useful knowledge must *always* be laborious, *often* painful and beset with difficulties, but to make the pursuit of knowledge *permanently* agreeable and pleasant to the student, we must not *begin* by poisoning everything in an atmosphere of fun, but engage his spirit, and impart to it those feelings which will cause it to enter on the pursuit independent of all extraneous stimulants. Let the student, prone to rest his oars on those extraneous incentives, reflect on the earlier course of those who are chronicled as the brightest orbs in the world of science. No situation in truth is without its unfavourable influences.

"He who is left to educate himself in everything may have many obstacles to struggle with, but he who is saved *every* struggle is perhaps still more unfortunate. We have numberless instances of persons in every rank of life who, for the sake of gaining useful knowledge, overcame the severest impediments.

"It will at least be seen that knowledge is not the exclusive inheritance of those who have been enabled to devote themselves to it from youth upwards, their examples also show us that many of those difficulties which in ordinary cases altogether prevent the acquisition of knowledge are real impediments only to the indolent and unambitious. The pleasure of acquiring knowledge is one all may enjoy who choose, let the pursuit of it engage us in the morning or evening of our days.

"Newton had completed all his grand discoveries before twenty-five—Cowper threw away thirty years

almost in devising nothing, and it was not until he reached fifty that he wrote all his more celebrated pieces—Beaumont, the dramatic poet, died at forty, and he had written his "Orphan" before thirty-one—Collins wrote his odes before he was twenty-six—Burns died at thirty-seven, and Byron at thirty-six, Mozart at thirty-five, Raphael at thirty-eight.

"To all present the name of Hutton is familiar; his father was a working woolcomber, and in the memoirs of his life he says: 'My mother, more than once, with one infant on her knee, and more around her, have all fasted a whole day, and when food arrived she has suffered them with a tear to take her share;' and as to Hutton himself, he says, 'I often fasted from breakfast one day till noon the next, and even then dined only upon flour and water boiled into a hasty-pudding.'

"The editor of the *Westminster Review*, one of the most brilliant writers of the day, was a cooper in Aberdeen; the editor of a London daily newspaper was a baker in Elgin; perhaps the best reporter on the *Times* was a weaver in Edinburgh; the editor of the *Witness* was a stonemason; one of the ablest ministers in London was a blacksmith in Dundee; another was a watchmaker in Banff; the late Dr. Milne, of China, was a herd-boy; Rhyne, the principal of the London Missionary Society's College at Hong Kong, was a saddler at Huntly; and one of the best missionaries that ever went to India was a tailor in Keith; the leading mechanist on the London and Birmingham Railway, with a salary of £700 a year, was a mechanic in Glasgow; and, perhaps, the richest ironfounder in England, was a working man in Moray; Sir James Clarke, the Queen's physician, was a druggist in Banff; Joseph Hume was a sailor first, and then a labourer at the pestle and mortar at Montrose; Mr. Macgregor, the member for Glasgow, was a poor boy in Rosshire; and Arthur Anderson, the member for Orkney, earned his bread by the sweat of his brow. Again, we find that Robert Burns was a ploughman; Franklin a journeyman printer; Henry Fielding, the British Cervantes, a private soldier; Kirke White articulated to an attorney; Bloomfield a shoemaker; Elihu Burritt a blacksmith; Ferguson, the astronomer, a shepherd; George Whitfield, the preacher, was a pot-boy; Shakespeare a poor actor; Thomas Chatterton a porter; John Ponds, the founder of ragged schools, a shoemaker; Nicholas Rowe, the poet laureat and tragedian, a land surveyor.

"These few instances illustrating the devotion with which knowledge has been pursued under the pressure of severe penury are clear evidences that literary pursuits confer power to conquer the calamities of poverty, and open sources of enjoy-

ment which no severity of fortune can altogether destroy. Men are sometimes found silly enough to boast their illustrious ancestry (pretty strong evidence of the weakness of their minds to begin with), but to those who have achieved their own advancement in the face of disadvantages of birth or fortune the very obscurity of their origin endows them (in my humble opinion) with a far more exalted honour.

"If it should happen that we are placed amongst others of our fellow mechanics (students), some of whom ridicule our love of reading and reflection—jeer at our want of sense and spirit—let us not be discouraged. If they prefer their vicious revellings for a while in spite of your example, and now and then a seasonable rebuke, there will be a time when, on a bed of sickness, they will remember your admonition (like a mother's gentle word in early life—never forgotten, however slighted), and seek for the very comforts you had so often urged on them, and they as often rejected. The society of their olden companions will then be as repulsive as once were your example and precept.

"The rich and idle, on whom the face of fortune has smiled, are apt to imagine themselves exempt from anything like action. They will *talk* beautifully on all things which other folks frame for the good of mankind (provided it happen to be *fashionable* so to do) but their purses are generally tightly fastened against contribution towards necessary *pecuniary* supplies.

"To see the masses of our people elevated above the drudgeries and frivolities of life, their minds developed and disciplined—the nature and relations of the great world around, and the greater world *above—within us*—the scroll of history unrolled to our perusal—the treasures of literature unlocked for our appropriation—habits of application and order built up amongst us; let every man who loves his fellow-man as he ought resolve, *under the exercise of wise and vigilant authority*, to help the progress of affairs like these, and the gratification attending it will surely amply repay any little *pecuniary sacrifice*—if sacrifice it ought to be called. Were it necessary, I could easily point out scores of names now eminent in the ranks of literature and science who are not ashamed to confess their obligations to these establishments for having assisted them in the attainment of their present high and distinguished position. The honourable W. W. Pepper, a circuit judge of Tennessee, was once a blacksmith, and, by way of joke, made with his own hands an iron fire shovel, which he presented to the governor, the honourable Andrew Johnson. In return governor Johnson, who was formerly a tailor, cut and made with his own hands a coat, and gave it to the judge."

Mr. Freeman thus concludes his able address:—

"Happily for the humblest of us there are objects on which we may find full exercise for the intellect, objects, not less glorious because they are near; not less divine because they are common. Above us at this moment is that great book of the night which Galileo and Newton read—near us (its waves all but audible) is that sea with which Columbus, Drake, and Franklin have struggled—and dashing against the shores of social life is that fiercer tide of ignorance and consequent misery over whose wild waters the efforts of our societies for the spread of useful knowledge, will I trust exercise a becalming and profitable influence. It has been the object of this little institute since its commencement to assist in this.—Those who sow are not always those who reap. It is not granted to every man to witness the successful result of his exertions, in any good cause. But I trust the day is not far distant when this institution will receive a more liberal pecuniary—and a warmer general support from the higher and wealthier classes of this town and neighbourhood,—and even from those whom the spirit of sect, or the prejudice of party, might possibly and unhappily have led them to regard it, either with feelings of indifference, or hostility."

BEAUMONT'S BILLS OF SALE.

The Law and Practice of Bills of Sale and Bills of Sale of Ships, under the Recent Statutes; with Precedents, &c. By JOSEPH BEAUMONT, Esq. Edited by the Editor of the "Law Times." London: John Crockford.

We have before alluded to the service which a writer may be considered as doing to the profession by producing a small work upon some practical part of the law, and the same remark applies with still greater force to Mr. Beaumont's production, because the subject of which he treats is one of importance not to a mere section of professional men, but to every one of them, for every solicitor is liable to be called on, very frequently at a moment's notice, to prepare a bill of sale. It is, therefore, of importance not only that he should have some previous knowledge of the matter, but also have at hand a trustworthy book to which he may at once have recourse. A statement of the contents of Mr. Beaumont's volume will suffice to let the reader know whether it is likely to be of service. There are eighteen chapters, which are as follows:—Chap. I. Of a Bill of Sale; Chap. II. The Parties to a Bill of Sale; Chap. III. Of the Recitals and Covenant to pay Principal Money and Interest; Chap. IV. Of the Assignment, and what passes by it; Chap. V. Of the Habendum, Proviso for Redemption, and Power of Sale; Chap. VI. Of the Proviso for Quiet Enjoy-

ment by the Mortgagor until Default; the Covenants, and Conclusion; Chap. VII. Of the effect of Bankruptcy on a Bill of Sale; Chap. VIII. Of Bankruptcy Assignees' Title; Chap. IX. Of the Effect of Insolvency on a Bill of Sale; Chap. X. Of the Rights of an Execution Creditor; Chap. XI. Of Subsequent Incumbrancers; Chaps. XII. and XIII. 17 & 18 Vic. c. 36; Chaps. XIV. and XV. Of Proceedings under a Bill of Sale; Chaps. XVI. and XVII. Bill of Sale of a Ship; XVIII. Of Sales and Mortgages of Ships by Certificate. In addition there is an appendix containing precedents, and the act for Registering Bills of Sale; the precedents, besides those relating to shipping, and taken from the schedule to the Shipping Act, are about a dozen in number, presenting several forms of bills of sales adapted to various circumstances.

Mr. Beaumont appears to have taken much pains with the work, and we think it will be found useful to practitioners. In Chap. 4 the author has noticed at some length, amongst other subjects, those relating to the assignment of after-acquired property, and what assignments do or not amount to an act of bankruptcy. Writing of the former subject, Mr. Beaumont says:—

"*After acquired property.*—Of course an assignment of *scheduled* goods will pass only such goods as are in existence, and belong to the donor at the time of his executing the bill of sale; and an assignment in general terms of all a man's goods and chattels in a particular house or place will not include any goods or chattels brought into the house or place after the assignment made, unless there be something more in the deed to show that it was intended that the assignment should include after-acquired property; and the mere fact that the description is general and the mortgagee authorised *after default* to enter into possession and enjoy the premises *for all the estate of the mortgagor* therein, and to take possession and enjoy all and every the goods, chattels, effects, and premises to his own use and benefit, will not warrant the court in coming to a conclusion that the bill of sale was intended to include and did include after-acquired property. The court can only give effect to the words of a deed as they find them, and if the intention of the parties was certain, still if the language did not effect such intention, it is not for the court to do so: (per Maule, J., in *Tappfield v. Hillman and others* 12 L. J. 311, C. P.) (*Lunn v. Thornton* 14 L. J. 161, C. P.) is another important authority upon this point. In that case the plaintiff, by deed-poll, in consideration of an advance made to him by defendant, bargained and sold to defendant all and singular his goods, household furniture, plate, linen, china, stock and implements of trade, and other effects, whatsoever,

'now remaining and being, and which should at any time after remain and be, in, upon, or about my dwelling-house and premises at Stoney Stratford, and also all other my effects elsewhere,' to hold to defendant absolutely. A memorandum was indorsed on the deed and signed by the parties, stating that the therein bill of sale of the goods and effects within mentioned was made to Thornton, in trust by sale and disposition thereof to pay him £112 7s. 6d., with interest &c. The defendant, acting upon this bill of sale, subsequently took possession of the goods upon the plaintiff's premises, and, amongst the rest, of certain goods, the value of which was deemed to be £4 10s., which were not on the premises at the time of execution of the bill of sale, but which had become the property of the plaintiff, and had also been brought on the premises after the execution of that instrument. Lunn brought trover for the goods so seized, to which the defendant pleaded—first, not guilty; secondly, except as to certain goods specified in the plea, not possessed; and, thirdly, leave and licence. Upon this issue was joined; and at the time it was contended by defendant's counsel that the bill of sale covered these goods, as being goods remaining and being in or upon the premises at the time of the seizure; and the learned judge, being of that opinion, directed the jury to find for the plaintiff upon the first and third issues, and for the defendant upon the second, reserving leave for the plaintiff to move to set aside the verdict on the second issue, and to enter it for the plaintiff with £4 10s. damages, if the court should be of opinion that the after-acquired property did not pass by the bill of sale. A rule nisi was obtained; and in delivering the judgment of the court, by which the rule was made absolute, Tindal, C. J. said: 'The question is, whether the property in the goods in question passed under the bill of sale. On the part of the plaintiff, the authorities are all very strong to show that no personal property would pass by grant other than that which belongs to the grantor at the time of the execution of the deed' (Perk. Prof. Book, tit. 'Grant,' Grantham v. Hawley, Hob. 129; 2 Roll Abr. 48 tit. 'Grant'); and his lordship continued, 'and still further, the plaintiff relied on the authority of Bac. Max. rule 14, '*Licet dispositio de interesse futuro, sit inutilis, tamen potest fieri declaratio præcedens quæ sortitur effectum interveniente novo actu,*' in which it will be observed that Lord Bacon takes the first branch of the maxim, namely, 'that the disposition of after-acquired property is altogether inoperative, as a proposition of law that is to be considered as beyond dispute, and only labours to establish the second branch of the maxim, that the disposition may be considered as a declaration precedent, which may

have effect given to it by some new act of the party after the property is acquired.' In the subsequent part of the judgment, the learned Chief Justice, referring to the attempt on the part of the defendant to establish that the facts of the case, namely the bringing the goods upon the premises of the plaintiff, where they were seized, subsequent to the execution of the bill of sale, was the new act done by the plaintiff, which gave the declaration of the previous bill of sale its effect, and thereby brought the case within the exception of Lord Bacon's rule, said: "It appears to us to be an answer to this that the evidence at the trial is altogether silent on the subject of what accompanied the bringing of the goods on the premises so that it is impossible to say whether it is the act of the plaintiff or not. And further, the 'new act' which Lord Bacon relies on (in all the instances he puts) is to be an act done by the grantor for the avowed object and with a view of carrying the former grant or disposition into effect. Lord Bacon's language is 'of declarations precedent, before any interest vested, the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent.' And his lordship (the Chief Justice) said, this evidently implies more than the simple act of bringing the property on the premises at a subsequent time, which, if sufficient, would render the rule altogether inoperative;" and his lordship accordingly declared the opinion of the court to be, that the case was not within the exception of the 14th of Lord Bacon's Maxims; but that the case fell under the general rule, and that no property in the goods passed to the defendant; and accordingly the rule was made absolute, and a verdict on the second plea, denying the property in the plaintiff, was entered for him.

"The decision of the Court of Common Pleas in the case of Lunn v. Thornton must be regarded as a leading authority on the law of bills of sale, and after-acquired property, it bringing out and recognising a most important principle—a principle which the Court of Queen's Bench very shortly afterwards recognised and acted upon in Gale v. Burnell (14 L. J. 340, Q.B.). Gale v. Burnell is so similar in the facts bearing upon the point now under consideration to Lunn v. Thornton, that were it not that it might mislead upon another point to which we shall have cause to call more particular attention, it might with propriety be passed over with but a slight notice. The case now before us was a feigned issue under the Interpleader Act, to decide whether certain goods seized by the sheriff of Somersetshire on the 2nd of January, 1844, under a writ of *f. fa.* in the case Burnell v. Allen, were at the time of the seizure, the property of Gale the claimant. The

facts of the case, as they appear from the report, were these: In 1843 Allen, in consideration of £518, by bill of sale assigned to Gale all and every the goods and furniture, &c. which then were, or which at any time during the continuance of this security should be, in, about, or belonging to the dwelling-house of Allen. The deed contained a proviso that, in case Allen should cause to be paid to Gale the said sum of £518 on the 1st January, 1845, or at such earlier time as Gale should appoint by notice in writing to Allen ten days before the time in such notice appointed for payment, and should in the mean time pay to Gale interest half-yearly, then those presents should be absolutely void. It was further provided that, after default made by Allen, Gale might enter, take possession, and sell, &c.; and that, until default, it should be lawful for Allen to hold, make use of, and possess the goods, &c. Allen remained in possession for a year, and then, on the 1st January, 1844, gave formal possession to Gale of all the goods then upon the premises. No notice was given to Allen requiring payment of the principal or interest, and the court, upon the authority of *Lunn v. Thornton*, held that the bill of sale was a *present conveyance* by which the property of all goods on the premises at the time of its execution passed to Gale; but goods brought upon the premises by Allen after the execution of the bill of sale did not pass under it. At the trial the learned judge directed the verdict for the plaintiff to the value of the goods which were upon the premises at the time of the execution of the assignment; and, a rule being subsequently obtained on behalf of the plaintiff to show cause why the damages should not be increased by the value of the goods brought upon the premises after the execution of the bill of sale, the court discharged the rule, observing that the deed could not operate as an assignment of the goods thereafter to be brought upon the premises and not specified.

"From the case of *Lunn v. Thornton*, we can easily understand why the deed did not operate as an assignment of the goods thereafter brought upon the premises by Allen; but the deed in *Gale v. Burnell*, purported to convey 'all property which, at any time during the continuance of the security, should be upon the premises;' which we apprehend would be regarded as a *declaration precedent*, which would derive 'life and vigour' from the 'new act' of delivery of the after-acquired goods by the donor to the donee; but, even for one moment supposing that the words of the bill of sale referring to the after-acquired property, do not of themselves constitute such a declaration precedent as was contemplated by Lord Bacon, yet, upon the very first principles, the property in the after-acquired goods was passed to Gale; for, as observed in Chapter I.,

the property in moveable things may be altered as well by gift and delivery, as by sale and grant (*Shep. Touch.* 227). It is only, therefore, upon the assumption (for the fact does not appear in the case as reported) that the *fi. fa.* was delivered to the sheriff before the delivery by Allen to Gale of the after-acquired property (and that by such delivery of the *fi. fa.* the after-acquired goods became bound as against Allen and all claimants under him) that we can reconcile the decision upon the rule in *Gale v. Burnell* with the true principles of law.

"*Increase in present property may be assigned.*—But although after-acquired goods and chattels cannot pass by a present assignment, yet any *increase* arising out of a *present property* may be assigned by a present deed; thus a man who has land may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant: (*Grantham v. Hawler*, Hob. 132, and *Petch v. Tutin*, 15 L. J. 280, Ex.) also, if a man grants to another all the wool of his sheep for seven years, the grant is good, by which it evidently intendeth the wool of the sheep that the grantor hath (*Perk. Prof. Book*, pl. 90). The above mentioned case of *Petch v. Tutin* is likely to create an impression that *future crops* can be passed by a present assignment; this, however, is not so, *if the seed be not sown*, for future crops, cannot be the subject of a bill of sale. The tenor of the remarks made by Parke B., in the case of *Congreve v. Evetts*, *Ubi post*, will justify this assertion; and a careful consideration of what was assigned by the bill of sale in *Petch v. Tutin* will lead to the conclusion that it was because the 'away-going crop' fell strictly within the meaning of the words defendants might yet to come,' that the Barons of the Exchequer ruled that such a crop which was not sown at the time of the execution of the bill of sale passed under a present assignment.

"*After-acquired property can be made subject to mortgage security.*—But, although goods and chattels not in existence cannot be passed by a present assignment, yet a bill of sale may be so prepared as to give the donee such a power over the donor's after-acquired property as entirely to place the same within the reach and disposal of the latter, not only as against the donor, but against third parties also. In the before-mentioned case of *Lunn v. Thornton*, Tindal, C. J., said that 'that was not a question whether a deed might not have been so prepared as to give the defendant the power of seizing such future personal goods as they should be acquired by him and brought upon the premises, in satisfaction of the debt, nor did there seem any doubt but that such power might be given.' And in *Congreve v. Evetts*, (23 L. J. 277.) in which the question under consideration was raised and decided, Parke, B. said:—

'Under the bill of sale it was considered on both sides that though the then growing crops passed on the execution of the deed, the after crops did not. As to these, the plaintiff was authorised to seize and take possession of all or such as might be substituted for those then existing, to sell and dispose of, and pay the costs &c., as well as the residue of the moneys unpaid, secured by the bill of sale, and under that power the plaintiff seized and took possession of the growing crops in question on the 21st February, and the day after the writ of *fi. fa.* on the defendant's judgment indorsed, to levy £307 17s. 2d. was delivered to the sheriff, who seized and sold for the sum of £294. The plaintiff contended that having actually taken possession of the growing crops before the delivery of the writ he was fully in possession of them, and could bring an action against any one for taking them, and his title ought to prevail against that of the defendant, *and we think he was so entitled.* If the authority given by the debtor by the bill of sale had not been executed it would have been of no avail against the execution; *it gave no legal title, or any equitable title, to any specific goods, but when executed, not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops; whether the debtor gives actual possession of the chattels by the delivery of his own hands, or points it out and directs the creditor to take it, or tells him to take any he pleases, for the payment of his debt, by the sale of it, the effect after actual possession by the creditor, is the same.* And the court accordingly gave judgment for the plaintiff, who had seized the goods under his power before defendant's *fi. fa.* was issued."

The intelligent reader of the above rather extended extract will doubtless have formed his own opinion of the work, in accordance with ours, that Mr. Beaumont has produced a work which is a great credit to him, and will be decidedly useful to the profession.

EXAMINATION QUESTIONS.

(Michaelmas Term, 1855).

PRELIMINARY.

1. Where, and with whom, did you serve your clerkship? 2. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. 3. Mention some of the principal law books which you have read and studied. 4. Have you attended any, and what, law lectures?

COMMON LAW.

1. Give an instance of a counter-claim that can be set off between the same parties in an action on contract, and of one that cannot. 2. What is the effect of a release given to one of two or more joint and several debtors? 3. How are the costs of the cause apportioned when the plaintiff has accepted money paid into court by the defendant in respect of a particular sum or cause of action, but goes on for more, and is defeated as to the residue of his claim? 4. What communication upon his documentary evidence should an attorney have with the other party previous to a trial; and what is the consequence of neglecting to take the proper steps? 5. State shortly the nature of an action in replevin, and some of its leading incidents. 6. If a new trial is granted without any mention of costs in the rule, what becomes of the costs of the first trial? 7. When may an affidavit, sworn before a judge of one of the superior courts, be received in another court to which such judge does not belong? 8. In what actions must leave be obtained for the payment of money into court? 9. When any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, how are they to be reckoned? 10. Explain briefly the terms—*Charter-party—General average—Stoppage in transitu.* 11. For what acts of his servant is a master legally responsible? 12. What general powers previously exercised by courts of equity were given to the common law courts by the Common Law Procedure Act, 1854? 13. Define an issue, and state how issues in fact and in law are respectively raised and tried. 14. In what instances may a tenant (under no special covenant respecting them) remove fixtures, and at what time? 15. What are writs of *ca. sa.* and *fi. fa.*, and whence are their names derived? Can they be used together, and what must be the amount of the debt for a *ca. sa.*?

CONVEYANCING.

1. Which were the four usual methods of conveying or transferring property, and which of those methods has ceased by any, and what, Act of Parliament? 2. What is the difference between jointure and dower, and how does each arise; and in a conveyance of freehold property to a purchaser, how is dower to his widow to be avoided? 3. To convey a lake or piece of water, how is the freehold thereof to be assured to a purchaser, and if the water alone be conveyed, what would pass to the purchaser? 4. State the different species or tenures of property with which you are acquainted, and how are they respectively assured? 5. If the property be in a registered county, what search should be made, and when should the conveyance of it be registered, and

what may be the consequence from delay in doing so? 6. Two persons (not partners) are to give their bond to A. for the payment of money, how is the obligation to be framed, so that if one of such two persons die, A. may claim upon the estate of the deceased? 7. Suppose that two persons are partners and they give their joint bond to A., and one of the obligors die, what claims has A. upon the surviving obligor, and upon the estate of the deceased? 8. A. joins in a bond with B. to C., A. being merely a guarantee for B., what should A. require for his indemnity against his obligation? 9. A conveyance is made to a purchaser in fee of certain defined lands, and afterwards mines or minerals are discovered under those lands, what would be the result to vendor or purchaser? Is there any legal dictum or maxim applicable? 10. A. is tenant for life, and B. tenant in tail of an estate, and B. has agreed to sell the fee simple to C., by what assurance and under what authority can that fee simple estate be assured to C.? 11. In examining an abstract of title with the title deeds, state what should be carefully attended to. 12. Suppose the title deeds are not in the vendor's possession, but in the hands of another person, what course is to be adopted to examine them with the abstract, and at whose expense? 13. The deeds or instruments abstracted being on record, and the originals cannot be produced, and the conditions of sale are silent as to any attested copies of such deeds, &c., is the purchaser entitled to have such attested copies, and at whose expense? 14. To avoid searching for incumbrances until immediately before the completion of the purchase, what should be done? 15. When do judgments bind leasehold estates, and where should searches be made as to such incumbrances?

EQUITY.

1. By what process does a court of equity execute its decrees? 2. Mention some of the cases in which the Courts of Chancery alone can afford relief. 3. And others in which the Court of Chancery has concurrent jurisdiction with other courts. In the latter, state the difference (if any) in the relief afforded. 4. State the difference (if any) in which the Court of Chancery and a court of common law would deal with an interest to which a married woman might become entitled. 5. Supposing A., a ward of court, about to marry B., each entitled to £10,000—state the terms of the settlement which the court would approve on behalf of the ward. 6. Suppose an estate conveyed to such uses as A. shall appoint. A. appoints to B. and his heirs, to the use of C. for life, remainder to the use of D. and the heirs of his body—what legal and equitable estates have A., B., C., and D. respectively? 7. In

a devise in the following form:—"I devise my estate at Blackacre to my son A., and as to all my personal estate I give the same to my son B." Suppose Blackacre to be subject to a mortgage for £5,000, which son has to bear the mortgage debt? and has any change been recently made in the law on this subject? 8. What is the doctrine of election? 9. What is an equitable mortgage? 10. Upon what terms can a mortgagor compel a mortgagee to produce his title-deeds? 11. State the progressive steps of a Chancery suit up to the hearing? 12. Has any practice been recently adopted for shortening the mode of taking evidence and proceeding to a decree? If so, state the steps. 13. What is the difference between the way in which the Court of Chancery and the courts of common law regard a mortgage? 14. A. being tenant for life of an estate, pays off a mortgage thereon. Can the benefit of the charge be secured to him? and how would you do it? 15. In the case of money paid into court by a railway company for purchase of part of a settled estate, how may it be applied for the benefit of the owners of the estate?

BANKRUPTCY.

1. At what periods respectively were the two latest statutes making any material alterations in the Bankrupt Law passed? 2. State generally the course of proceedings under the act for consolidating the Bankrupt Law, in order to obtain an adjudication in bankruptcy. 3. Are there any, and what means by which a trader can effect an arrangement with his creditors, and be discharged from his debts without a petition for an adjudication in bankruptcy, or proceedings under the Insolvent Debtors' Act? 4. What are the requisites to support a petition by a creditor for an adjudication in bankruptcy? 5. Is a trader entitled to any, and what, notice of an adjudication of bankruptcy; and any, and what, time to dispute the same? 6. Is it essential to the validity of a petition for adjudication that the petitioning creditor's debt should be due and payable at the time of the act of bankruptcy? 7. Specify generally the kinds of debts which may be proved under a bankruptcy. 8. If a verdict is obtained against a person before his bankruptcy subject to a reference, and the award is made after the bankruptcy, is the amount awarded provable by the plaintiff? 9. What is the course to be adopted by the insured under a policy of insurance, or the obligee in a bottomry bond, when the underwriter or obligor is declared bankrupt, pending the risk? 10. If a debt be not payable at the date of the adjudication, *e. g.*, if it consist of a bond or bill for payment of money at a future period, is it admissible to proof under what provision, and how? 11. If the drawer, acceptor,

and first indorsee of a bill of exchange become bankrupt, to what extent can a second indorsee who holds the bill for a valuable consideration prove and receive dividends under each estate? 12. If the creditor have only an equitable, and not a legal mortgage, by way of security, what course should he take to make the security available, and at whose expense? 13. Is there any, and what, difference between the rights and remedies of an equitable mortgage with, and one without, writing? 14. By what means will assignees become personally answerable for the rent of premises which have been held by the bankrupt? 15. What are the requisites to establish a right in the assignees of a bankrupt to property in his possession at the time of his bankruptcy belonging to another party?

CRIMINAL LAW.

1. State the nature of the jurisdiction of the Court of Queen's Bench in regard to felonies and misdemeanors. 2. State some of the offences which can, and some which cannot, be tried at the Quarter Sessions. 3. State what constitutes felony in the general acceptance of the English law. 4. What is the highest crime that any person can commit? 5. What is homicide, and what are its different kinds? Give examples of each. 6. What is the legal distinction between murder and manslaughter? 7. What is essential to be proved to constitute the offence of burglary? 8. What is defined to be the night-time, with reference to the offence of burglary? 9. Define the offence of forgery. 10. Are there any cases in which forgery is punishable with death? 11. What acts constitute the offence of larceny? 12. Is the stealing of title deeds, relating to real estate criminal? 13. Give a definition of the crime of embezzlement. 14. Define the offence of perjury, and the punishment for a person convicted of it. 15. What is a common nuisance? and how are persons committing it prosecuted?

EXAMINATION ANSWERS.

(*Michaelmas Term, 1855.*)

COMMON LAW (*antq.* p. 188).

I. *Set off*.—A debt due by the plaintiff to the defendant for goods sold, &c., can be set off in an action by the plaintiff on a contract between the parties; but if the plaintiff sued with another party interested in such contract, the defendant could not set off his separate claim (*France v. White*, 6 Bing. N. C. 33; *Selw. N. P.* p. 155, 11th edit.; see as to the general rules of set off, 1 *Chron.* 23, 307, 327).

II. *Release to one of several joint debtors*.—A release (not being a mere covenant not to sue) given to one of several joint or joint and several debtors, for there

is but one duty extending to all the debtors, and therefore a discharge to one is a discharge to all (3 *Scott N. R.* 502; *Selw. N. P.* p. 588, 11th edit. *Cocks v. Nash*, 9 Bing. 341.)

III. *Costs where money paid into court*.—If a defendant pays money into court in respect of a particular cause of action, and the plaintiff accepts same in respect thereof, but goes on for more, and is defeated, the defendant will be entitled to the costs of the cause, commencing at "instructions for plea," and the plaintiff will have the costs of the cause in respect of such part of his claim as relates to the sum paid into court up to that period (*Harrison v. Watt*, 11 Jur. 91; *Reg. Gen. Hil. T.* 1853, pl. 12).

IV. *Notices to admit*.—Previously to a trial the attorney of either party should give to the other side a notice to admit; in default thereof no costs will be allowed unless it can be shown that the expense of the notice would have been greater than that of the witness (*Reg. Gen. Hil. Term*, 1853, pl. 30; 15 and 16 Vic. c. 76, s. 117).

V. *Replevin*.—A replevin is a mode of contesting the validity of a distress (for to such a proceeding it is in practice confined. On the tenant giving surety to the sheriff, the latter re-delivers to him his goods, and the tenant then enters a plaint in the county court, and prosecutes same there unless it be removed (where the rent is £20) to one of the superior courts (*Bac. Abr. "Replevin," A.*; 9 & 10 Vic. c. 95, ss. 119, 120; *County Co. Rules*, 1851, pl. 192—196).

VI. *New trial—Costs*.—Where no mention is made in a rule for a new trial of the costs, if the party obtaining it succeeds on the second trial, neither party is entitled to the costs of the rule; if he fails on the second trial, the costs of the rule will form part of the general costs of the other party (*Eccles v. Harper*, 14 Mees. and W. 248; *Sherlock v. Barned*, 8 Bing. 21; *Lush's Pract.* 495, 2nd ed.).

VII. *Affidavit sworn before judge of another court*.—An affidavit may be received in a court of which the judge before whom it is sworn is not a member, where it is made in or relating to any cause or matter, belongs to the court in which it is to be used, although it be one over which the courts of common law have no common jurisdiction (*Lush's Pract.* 237, 641, 2nd edit.; 1 & 2 Vic. c. 45, s. 1).

VIII. *Payment of money into court*.—Leave to pay money into court is necessary where one or more of several defendants is desirous to pay money into court (15 & 16 Vic. c. 76, s. 70).

IX. *Reckoning time*.—Where any particular number of days not expressed to be "clear" days is prescribed by the rules or practice of the court, the same is reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day falls on

a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time is reckoned exclusively of that day also (Reg. Gen. Hil. T. 1853, pl. 174).

X. *Charter party—General average—Stoppage in transitu.*—A charter party is an agreement between either the owner or master of a ship, on the one part, and the owner of the goods on the other, for the employment of the ship in the conveyance of goods for a certain voyage, or any given period, at a certain amount of freight, calculated at so much per ton or at so much per month during the voyage. (2 Steph. Com. 132, 3rd edit.). The term "general average" is used to express the contribution which is made by the proprietors in general of a ship or cargo towards the loss sustained by any individual of their number, whose property has been sacrificed for the common safety in a storm (Park, Ins. 121; 2 Steph. Com. 126, 3rd edit.). *Stoppage in transitu* is that right which the law gives the vendor in certain cases to reclaim goods previously sold whilst in their transit to the purchaser. This right arises where the goods, having been sold on credit, the vendor ascertains, before the goods reach the purchaser's hands, that he is insolvent or bankrupt (Hodson v. Loy, 7 Term Rep. 440; Tanner v. Scovel, 14 Mees. and Wels. 28; Addison's Contracts, 61; Mc Ewan v. Smith, 13 Jur. 265). In the last cited case the distinction between the doctrine of stoppage *in transitu* and the ordinary case of vendor's lien is well explained. Though the indorsement of a bill of lading for valuable consideration takes away the right of stoppage (see 1 Law Chron. pp. 122, 123; 18 & 19 Vic. c. 140, s. 2) it is not so with respect to a mere delivery order; for the transferee does not, as against the first vendor, acquire a better title to the goods than the first vendee (Mc Ewan v. Smith, *ib.*). It is a legal right, and favoured by the courts, for it is conferred on meritorious persons only. It is not necessary that the person should be actually insolvent at the time of the stoppage, for if the insolvency should happen before the arrival of the goods, it would be sufficient to justify what had been done, and entitle the party to the benefit of his own provisional caution (3 East, 568; 4 Bing. 585; 2 Mees. & Wel. 365; Roscoe's Ev. 538, 5th edit.).

XI. *Liability of master for servant's acts.*—Where a servant does a tortious act by the direction or with the assent of his master, the latter is liable. This liability extends to negligence by the servant, productive of injury, whilst on his master's business, though the master be not present (see Key, div. "Common Law," pp. 52, 53, 3rd edit.; 2 Steph. Com. 235, 3rd edit.; Gordon v. Rolt, 4 Exch. Rep. 366; 15 Jur. 23).

XII. *Discovery—Equitable defences.*—The Common Law Procedure Act, 1854, gave to courts of common law the powers of discovery as to facts by means of the exhibition of interrogatories to the parties to the suit, and also enabled the parties to plead and reply on equitable grounds in defence or support of the action (1 Law Chron. pp. 160, 162, 311).

XIII. *Issue.*—An issue is the point raised by the parties to an action for decision; if it be an issue in fact it is tried by the jury; it is raised by the parties denying some matter of fact; an issue in law is tried by the court: it is raised by a demurrer, as it is called, to the pleading of the other party—i. e., an objection to its insufficiency in point of law.

XIV. *Fixtures, removal by tenant.*—As between landlord and tenant, it has been held that the latter, though guilty in general of waste, if he despoils the freehold, may nevertheless take away during the continuance of his term, or at the end of it, *but not after he has quitted the premises*, such fixtures as he has himself put up on the demised premises, either for the purpose of trade, or for the ornament or furniture of his house, if thereby the freehold is not materially damaged (see Elliott v. Bishop, 1 Law Chron. 417). When a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed (as a door which may be lifted from its hinges, or a sliding fender, used to prevent the escape of water from a mill-stream), it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether in the particular case it has become so or not, may be a question on the evidence, and a jury may infer, from use or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again (Wood v. Hewitt, 8 Queen's Bench Rep. 913; S. C. 15 Law Journ., N. S., Q. B. 247; 10 Jur. 390; Mant v. Collins, 15 Law Journ., N. S., Q. B., 248; S. C. 10 Jur. 390). It is doubtful whether, where a door-plate is put by a lodger on the outer door of a dwelling-house, whether or not it comes within the rule *quicquid plantatur solo, solo cedit* (Lane v. Dixon, 3 Com. Bench Rep. 776; S. C. 16 Law Journ., N. S., C. P. 129; 11 Jur. 89). But the right of removal of fixtures did not extend to things annexed to the realty, for purposes merely agricultural (nor even to erections for ornament or pleasure), if they were of such a nature that their removal would be of material detriment to the freehold: for all those cases fell under the general rule *quicquid plantatur solo, solo cedit*, and not under the exception, and must consequently have been yielded up to the landlord at the end of the term, as parcel of the inheritance (2 Steph. Com.

262, 1st edit.; p. 207—210, 2nd edit.; *Elwes v. Maw*, 8 East, 55; *Lyde v. Russell*, 1 Barn. and Adol. 894; *Buckland v. Butterfield*, 2 Brod. and Bing. 54; Co. Litt. 53 a, n. 5; Selw. N. P. 1866, 11th edit.; see 2 Law Stud. Mag., N. S., 60—65, 89—93, 283—289; 1 *Id.* Suppl. p. 145—150). But by 14 & 15 Vict. c. 25, s. 8, if any tenant of a farm or lands, shall, with the consent in writing of the landlord, at his own expense, erect any farm building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture, the same may be removed by the tenant, he making good any injury to the premises, if the landlord shall not on one month's previous notice by the tenant of such intended removal, elect to purchase the erections.

XV. *Ca. sa. and fi. fa.*—Writs of *capias ad satisfaciendum* and of *feri facias* are writs of execution whereby a party obtains the fruit of a judgment or order in his favour. The *ca. sa.* is derived from the latin words "that you take to satisfy," &c.; the *fi. fa.*, "that you cause to be made," &c. A *ca. sa.* cannot issue where the debt is less than £20 (1 Chron. 275). The writs cannot be executed together, but after a *fi. fa.* on which the debt and costs are not wholly raised, a *ca. sa.* may issue, but a *fi. fa.* never issues after a *ca. sa.*

CONVEYANCING (*ante*, p. 188).

I. *Conveyances.*—The four usual methods of conveyancing or transferring property, where the lease and release, grant, surrender (of copyholds), and assignment (of leaseholds). The lease and release have, in respect of lands in England, ceased to be used in ordinary transactions. This is by virtue of the enactment in the 18 & 19 Vic. c. 106, to the effect that the immediate freehold of lands shall be in grant (see 1 Steph. Com. 493, *et seq.* 3rd edit.; Key, div. "Conveyancing," p. 109, 3rd edit.).

II. *Jointure and dower.*—Jointure is a provision made for a wife by the act of the husband, whereas dower is a provision made for her by the law. A jointure at law requires great strictness, but equity holds the wife bound by her acceptance of a provision not made according to the legal requisites, which are chiefly, that the jointure take effect immediately on the husband's death, that it be for the wife's life, and be to herself and not to a trustee, and, properly, be stated in the deed to be in satisfaction of dower. Dower arises where the husband dies seised in fee simple or fee tail of lands of freehold tenures without having exercised his statutory power to deprive the wife of her right therein (*Hamilton v. Jackson*, 2 Jon. and Lat. 295; *Bell's Husband and Wife*, 338—341; Key, div. "Conveyancing," p. 97—102, 3rd edit.).

The mode of barring dower in a conveyance of freeholds in some degree depends upon the wife's being an old or new one, i. e. upon her having been married prior or subsequent to the 1st of January, 1834. If the parties were married prior to the 1st Jan. 1834, the old method of preventing dower should be adopted, namely, limiting the estate to such uses as the purchaser shall by deed or will appoint, and for want of appointment to the use of a trustee, his heirs and assigns, during the life of the purchaser, in trust for him, and subject thereto to the use of the purchaser, his heirs, and assigns (Co. Lit. 879 b, n. (1); *Burton's Comp.* 303, note; *Bythewood's note to Noy's Max.* 90 *et seq.*; 2 *Barton's Elem. Convey.* 271; 2 Law Stud. Mag. N. S. Supp. pp. 51, 184). Where the purchaser was married after the 1st of January, 1834, it would suffice to insert in the conveyance an express declaration that his wife should not be dowable, but it is usual to insert an express limitation to trustees to bar dower. By these means the necessity of inquiring whether the purchaser was married or not, and if married, what was the date of his marriage, is prevented (9 *Jarm. Convey.* 74, 75, notes, Sweet's Edition; *Hay, Introd. Convey.* 274, 620, note, 4th edit.).

III. *Conveyance of lake or water.*—In order to assure a lake or piece of water, the land underneath should be conveyed, for by the grant of a lake or piece of water, merely the water, together with a right of fishery, only passes (Key, div. "Conveyancing," p. 4, 3rd edit.; *Burt. Comp.* pl. 550; 1 Steph. Com. 162, 3rd edit.).

IV. *Tenures and assurances of property.*—The different species or tenures of property are freeholds, copyholds (including customary freeholds and ancient demesne), frankalmoign, gavelkind, and borough-English. Copyholds are conveyed by surrender and admission, and the others either by grant or assignment, according as the interest is a chattel or more than a chattel. In the case of a conveyance by an infant of gavelkind lands a feoffment is necessary (see Key, div. "Conveyancing," pp. 14—23, 162 *et seq.*; 1 Steph. Com. 198, 204, *et seq.*, 2nd edit.; 2 Black. Com. chaps. 5 and 6).

V. *Registry of conveyances.*—Where the property lies in a register county the registry office should be searched by a purchaser. By the registry acts (2 & 3 Anne, c. 4, s. 1; 5 Anne, c. 18; 6 Anne, c. 35; 7 Anne, c. 20; 8 Geo. 2, c. 6), it is provided, that all deeds and wills concerning lands, &c., in Middlesex, or in the East, West, and North Ridings of Yorkshire, or in the town and county of Kingston-upon-Hull, shall be registered in offices established for that purpose, and that every such deed or will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable

consideration, unless, as to deeds, a memorial of them be registered before the registry of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim, and unless as to wills a memorial of them be registered within six months after the death of the testator, dying within Great Britain, or within three years after his or her death, dying on the sea or in parts beyond the seas. In these statutes there is an exception of copyhold estates, leases at rack rent, and leases for twenty-one years, where the actual possession accompanies the lease; also of chambers in Serjeants' Inn, the inns of court, and Chancery (Powell on Mortg. 618, note by Coventry; see 2 Law Stud. Mag. N. S. 252—254; 1 Law Chron. 19—21, 429—432). Deeds should be registered immediately, as by delay in so doing a subsequent purchaser, without notice, registering his deed first will be entitled to priority (Sugden's Vend. ch. 16, s. 5; Shepp. Touchst. 116, note by Atherley).

VI. *Bond by two obligors*.—Where two persons, not being partners, are to give their bond to a third person for the payment of a certain sum of money, and it is wished that in the event of the death of one of the obligors, the obligee should have a legal claim upon the deceased obligor's personal representative, the obligation should be several, or joint and several, and not joint merely. For it is holden that in the case of a joint contract by several persons, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued (2 Williams's Executors, 1239, 2nd edit.; Godson v. Good, 2 Marsh. 300; S. C. 6 Taunt. 594; Hamond v. Jethro, 2 Brownlow, 99; 6 Beav. 185; Osborne v. Croshern, 1 Siderf. 238; Calder v. Rutherford, 3 Brod. and Bing. 302). And in equity the bond cannot be proved, as such, against the assets of the deceased obligor (Richardson v. Horton, 6 Beav. 185; 2 Williams's Executors, 1486, 4th edit.). But if the contract be several, or joint and several, the executor of the deceased contractor may be sued at law in a separate action (2 Williams's Executors, 1240, 2nd edit.; May v. Woodward, Freem. 248; Hall v. Huffman, 2 Levinz, 228; 8 Merivale, 619).

VII. *Joint bond by partners*.—At law, the representatives of a deceased partner are not liable to the joint engagements of the firm, whether contracted by bond, bill, note, or otherwise; but all actions thereon must be brought against the surviving partner or partners alone. In equity, however, a partnership debt constitutes the several contract of each partner, consequently the joint creditors have a claim upon the assets of every deceased partner for their respective demands (Lane v. Williams, 2 Vernon, 277, 292; Bishop v. Church,

8 Atkyns, 261; Devaynes v. Noble, Slesch's Case, 1 Meriv. 568). This equity arises incidentally from the right among the partners themselves to have the assets of the deceased partner applied in discharge of the joint obligations. But the principle, it has been said (Sumner v. Powell, 2 Meriv. 80; 8 Jarman's Convey. by Sweet, 287), extends only to debts contracted by the partners in the course of their joint trade, and not to engagements entered into by them *aliunde*. But in a more recent case (Thorpe v. Jackson, 2 You. and Coll. 553), the restriction of such principle to mere mercantile transactions has been denied (8 Jarman's Convey. by Sweet, 276, 284; 7 *Id.* 49, 50). It was formerly considered that in order to entitle a joint creditor to come upon the personal representatives of a deceased partner, it should be shown that the surviving partner was insolvent (see 2 Williams on Executors, 1240, 2nd edit. pl. 1489; 4th edit.; 1 Meriv. 530; 8 *Id.* 619; 2 Russ. and Myl. 495; Wilkinson v. Henderson, 1 Myl. and Ke. 582). But it is now (according to the last edition of Williams on Executors, pp. 1483—1486), the general opinion that the joint creditor may resort to the assets of the deceased partner in the first instance.

VIII. *Surety in bond*.—A person joining another in a bond as a mere surety for the latter should for his indemnity against his obligation obtain a warrant of attorney authorising him to enter up judgment against the party for whom he is surety.

IX. *Mines under lands conveyed*.—If after lands are conveyed in fee mines or minerals are discovered thereunder, the purchaser will be entitled thereto. The maxim is *cujus est solum ejus est usque ad cælum*, which applies both upwards and downwards (1 Steph. Com. 163, 3rd edit.; Key, div. "Conveyancing," p. 3, 3rd edit.).

X. *Conveyance by tenant in tail in remainder*.—The assurance may be by deed inrolled, to which A., if he took his life estate under the same assurance as that which created the entail, must give his consent, unless, indeed, the tenant in tail is also entitled to the immediate remainder or reversion in fee. It is assumed that A.'s life estate is not to be merged (3 & 4 Will. 4, c. 74, s. 34; 1 Steph. Com. 548, 549, 2nd edit.; Key, div. "Conveyancing," p. 39, 3rd edit.).

XI. *Examining title deeds*.—In examining an abstract of title with title deeds, the attention should be particularly directed to the descriptions of the parties, the recitals, the parcels, and the covenants for quiet enjoyment, free from incumbrances, which frequently lead to incumbrances and facts which have been suppressed. This should be particularly attended to, as a purchaser is bound by every deed or fact to which an instrument in his possession leads

by recital or description (see Sugden's Vend. and Purch. 437, 11th edit.). The solicitor must also scrutinise the execution and attestation of deeds and wills, the receipts indorsed, and the stamps; and he should carefully peruse all settlements and wills from beginning to end, in order that no clause that can possibly affect the title may escape (1 Jarman and Byth. Convey. by Sweet).

XII. *Title deeds not in vendor's possession.*—Where the title deeds are in the hands of a third person, who will not part with the possession of them, the purchaser's solicitor must attend such third party; the expense of the journey, however, in the absence of stipulations to the contrary, will have to be paid by the vendor, as the additional expense thereby occasioned (1 Sugd. Vend. and Purch. 448, 11th edit.; 2 Law Stud. Mag. N. S. Supp. p. 42; Dart's Vend. 225, 2nd edit.; 1 Jarman's Convey. by Sweet, 99).

XIII. *Attested copies—Instruments of record.*—The instruments being of record, the purchaser is not entitled to attested copies (Cooper v. Emery, 1 Phill. 388; Key, div. "Conveyancing," p. 155, 3rd edit.).

XIV. *Incumbrances—Searching.*—With a view to postpone searching for incumbrances it is advisable to ask the vendor, or his attorney, whether there are any incumbrances which do not appear on the abstract; for if he answer in the negative, the search for incumbrances may be postponed until immediately before the execution of the conveyance; and if there are any incumbrances, and the purchase cannot be completed on that account, the purchaser can recover all his expenses from the vendor (Richards v. Barton, 1 Esp. N. P. C. 268; Sugd. Vend. and Purch. 669, 11th edit.). It may be observed, that it is absolutely necessary to search for incumbrances immediately before the conveyance is executed, and particularly for judgments, as they may be entered up unknown to the purchaser just before the completion of the purchase. However, should any judgment be entered up after the purchase money, being an adequate consideration, is actually paid, equity would relieve the purchaser against the judgments, notwithstanding they were entered up previously to the execution of the conveyance; the vendor being, in equity, only a trustee for the purchaser, and a judgment being merely a general lien, and not a specific lien on the land (Sugd. Vend. and Purch. chap. 12, pl. 32; Finch v. Earl of Winchelsea, 1 P. Will. 278; Prior v. Penfaze, 4 Price, 99; Neate v. Marlborough, 3 Myl. and Cr. 417; 1 Prest. Abst. 191; 3 Id. 318, 324, 334, &c.).

XV. *Judgments—Leaseholds.*—Leaseholds are not bound by the mere registry, without notice, of a judgment; the writ of execution must be delivered

to the sheriff to bind them (2 Law Stud. Mag. N. S. Supp. 43; Key, div. "Conveyancing," pp. 149, 150, 3rd edit.). The statements in Sugden (p. 667, 11th edit.), and in Dart (p. 260, 2nd edit.), apparently to the contrary, are not really so. The searches for judgments should be made at the Common Pleas Registry Office, in Rolls Garden, and the County Court Registry Office (1 Law Chron. xviii) and in the Register Counties at the registry office in the county (Key, div. "Conveyancing," pp. 150, 151, 3rd edit.).

EQUITY (*ante*, p. 189).

I. *Enforcing Decree.*—A decree of a court of equity may be enforced, either by writ of attachment, serjeant-at-arms, and sequestration, or by writ of assistance. The party must, however, be first served with the decree (order of 11th of April, 1842). By 1 & 2 Vic. c. 110, and the orders of May, 1839, where the decree or order is for payment of money or costs, &c., the party to whom same is or are ordered to be paid, may, after the lapse of one month from the time when such order for payment was duly passed and entered, sue out one or more writ or writs of *fiery facias*, or writ or writs of *elegit* (5 Beavan's Rep. 228; Prac. Eq. 316). When the decree is against a peer or other person, having privilege of Parliament, instead of an attachment, a sequestration issues. If the defendant is a corporation, a *distringas* issues, which is followed by a sequestration. By 1 Will. 4, c. 36, s. 15, r. 15, when any person is directed by decree or order to *execute any deed*, or other instrument, &c., and shall refuse or neglect to do so, and shall have been committed to, or detained in custody for such contempt, and shall remain in prison, the court may, upon motion or petition, and upon affidavit that such person has, after the expiration of two calendar months from his committal or detainer, again refused to execute such deed, &c., order or appoint one of the masters in ordinary or extraordinary to execute such deed, &c., in his name, and to do all necessary acts. Notice thereof is to be given to the adverse solicitor within ten days, and the party is to be considered as having cleared his contempt, except as regards the payment of the costs of the contempt (2 Dan. Pract. 1050, 2nd edit.; Pract. Eq. 325, 326).

II. *Exclusive jurisdiction of equity.*—Some of the cases in which courts of equity alone can grant relief are, the cancellation and delivering up of documents, specific performance of agreements (see, however, 1 Law Chron. 317, 318), perpetuating testimony, the enforcement of trusts, redemption of mortgages, arrangement of rights of creditors and legatees of a deceased person, superintendence of lunatics and of charities (as to which, however, the

charity commissioners exercise some control), relief from penalties and forfeitures, and the protection of married women and infants (Key, div. "Equity," p. 7, 3rd edit.; 3 Law Stud. Mag. N. S. Supp. pp. 23, 87; 2 *Id.* 290—292).

III. *Concurrent jurisdiction.*—The courts of common law and of equity have concurrent jurisdiction in some instances. In some cases of fraud, courts of equity and of common law have concurrent jurisdiction (See *Thoroughgood's Case*, 2 *Coke's Rep.* 9 a; 1 *Fonbl. Treat. Eq. b. 1, c. 1, s. 3, n. f.*). Again, though in the cases of accidents courts of equity have jurisdiction, yet, in many instances, courts of common law will furnish a remedy. Such are the instances of the loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, &c. (3 *Black. Com.* 491; 1 *Story's Eq. Jurispr. c. 3*). Trusts are said to be the proper objects of the jurisdiction of courts of equity, yet some kinds of trusts are cognisable in courts of law, as deposits and all manner of bailments, &c. (*Woodd. Vin. Lect. l. 7*, pp. 208, 290; 1 *Story's Eq. Jurispr. s. 60*). Courts of equity have concurrent jurisdiction in cases of dower, though this was formerly doubted (*Fonbl. Treat. Eq. b. 1, c. 1, s. 3, n. f.*); *Curtis v. Curtis*, 2 *Bro. C. C.* 634; *Princ. Eq.* 159). The difference in the relief given by the courts of common law and those of equity is that at law only the case of the party suing is considered; but, in general, courts of equity require all the parties interested directly or indirectly to be before them, either actually or by representation, in order to make a complete decree, so as not to require another proceeding by any other party interested.

IV. *Feme covert's interest.*—This is a very vague question. A court of common law would not deal with an interest to which a married woman might become entitled, but a court of equity would secure it, if possible, for her benefit, under the provisions of any settlement executed or agreed to be executed, or, if none such, then under the doctrine of her equity to a settlement, as to which see 1 *Chron.* pp. 9, 87, 200, 272, 372, 459.

V. *Ward of court—Settlement.*—Although we have consulted the various books of chancery practice and treatises, including *Martin's Conveyancing*, *Bythewood* by Jarman, *Macpherson on Infants*, *Maddocks' Chancery*, and also many reports, we yet are unable to give a satisfactory answer to this question, which, however, the examiners appear to think an articulated clerk should be able to give an answer to without consulting any works. In 4 *Martin* (p. 467, note), it is said: "It was stated in the master's report in the case of *Chassaing v. Parsonage* (5 *Ves.* 18) that where the husband has no fortune to settle, the court

has thought fit, upon the treaty for the marriage, to narrow the husband's interest to one half of the produce of her fortune, in case he survives her and there are no children." The best statement, and probably the most accurate one, is to be found in *Bennett's Practice of the Master's Office*, at p. 122, in which it is said that the settlement should be of one-fifth of the dividends and interest of the property upon the husband, and the residue upon the wife, for her sole and separate use during the joint lives of herself and her husband, with a clause to prevent anticipation, and a power to the wife to give another one-fifth to the husband by will, the residue, subject to a provision for maintenance, to accumulate, and with the principal to go to the children at their respective ages of twenty-one or day of marriage; a power to the wife to settle upon such after-taken husband (in case he should survive her) any proportion of the dividends not exceeding one moiety thereof for his life. In case of no children, the husband surviving, the limitation, as, in default of appointment, to her next of kin, exclusively of her husband (see *Wynch v. James*, 4 *Ves.* 386; *Wells v. Price*, 5 *Ves.* 898; *Long v. Long*, 2 *Sim.* and *Stu.* 119; *Bathurst v. Murray*, 8 *Ves.* 74; *Cave v. Cave*, 15 *Beav.* 227). But the above applies to the case of a marriage where the husband had property (see 2 *Turner's Chanc. Prac.* 431). Where a ward had married without leave, her husband being ignorant of the wardship, and her fortune was £3,700, the court approved a settlement, under which the husband took a life interest after the wife's death in a moiety of her property, determinable on his marrying again, or insolvency, &c., and directed £500 to be advanced to him on his bond (*Richardson v. Merrifield*, 4 *De Gex and Sm.* 161; but see *Martin v. Foster*, 19 *Jur.* 337; 1 *Law Chron.* 124, 200, 204, 296, 298, 876).

VI. *Appointment to uses.*—On such an appointment as that in the question, B. would have a legal fee, C. an equitable life estate, and D. an equitable tenancy in tail, with, until equitable entail was barred, an equitable reversion in fee in A., as we assume that he has the fee in default of appointment, or so far as any appointment shall not extend.

VII. *Devise of an estate charged with a mortgage.*—Though formerly different (see Key, "Equity," p. 23, 3rd edit.), yet now, by the 17 & 18 *Vic. c. 113* (set out 1 *Chron.* p. 154) the devisee must bear the mortgage debt, and not the personal estate (1 *Chron.* 164, 170, 408).

VIII. *Election.* The doctrine of election in courts of equity as to wills is this (see *Burt. Comp. pl.* 1562; 16 *Jur.* 984), that where a testator has, by his will, disposed of the estate of another, to whom he has also, by his will, given other property,

whether immediately, or remotely, or contingently, whether of value or not of value, real or personal, the party shall not be permitted to enjoy any benefit under the will, without relinquishing his claim against it, but shall be put to his election; and if such devisee or legatee labour under any disability, as infancy or coverture, the court will refer it to the master to inquire whether it will be most beneficial for the party to take under or against the will, and decree accordingly (2 Fonbl. Treat. Eq. 325, 326, 2nd edit.; 2 Story's Eq. Jurispr. §. 1082, *et seq.*; Gretton v. Howard, 1 Swanst. 441; note). Where the devisee elects against the will, there is not, it seems, an absolute forfeiture; but there is a duty of compensation (at least, where the case admits of it) or its equivalent; the surplus does not devolve as an undisposed of residuum, but belongs to the donee. "The equity of the court (says C. J. De Grey) is to sequester the devised interest *quosque*, till satisfaction is made to the disappointed devisee" (see and compare 2 Story's Eq. Jurispr. s. 1085; Tibbetts v. Tibbetts, 19 Ves. 662; S. C. 2 Meriv. Rep. 96; *per* Ld. Eldon in Green v. Green, 19 Ves. 667; 2 Fonbl. 326, note, 2nd edit.; Sugd. on Powers, c. 6, s. 2, pp. 380, 381, 3rd edit.). This can only be done in equity, and, indeed, the whole doctrine of election (which is by no means confined to wills), though not unknown to the law, is properly of equitable cognisance (*Per* Lord Redesdale, in 2 Scho. and Lefr. 450; 1 Swanst. 425, note; Princ. Eq. 320; 3 Law Stud. Mag. N. S. Supp. p. 180).

IX. Equitable mortgage.—An equitable mortgage is where the mortgagee has no legal conveyance at all, or one that is invalid, or does not pass a legal estate; but the most usual kind of mortgage intended by the term "equitable mortgage" is that which arises by the deposit of title deeds, which is generally accompanied by a written memorandum, though the mere deposit of the deeds without a word passing will suffice (Jarman's Convey. by Sweet. 109—136; 3 Jur. 762, 763, 860—862; Princ. Eq. 303—306; Keys v. Williams, 2 Jur. 611, 612; S. C. 8 You. and Coll. 55; 1 Steph. Com. 263, n. (d), 1st edit.; p. 290, n. (d), 2nd edit.). It seems, that even where there is no bankruptcy, the holder of an equitable mortgage may, upon a bill filed, obtain a decree either for an absolute conveyance and foreclosure, or for a sale (4 Deacon's Rep. 78; see Cocker v. Garratt, 4 Law Stud. Mag. No. 37, N. S.), the court allowing the defendant six months to redeem (see Parker v. Housefield, 2 Myl. and Ke. 419; 3 Jur. 860), and in the case of an infant, of course, after coming of age, unless a sale should be thought more beneficial, in which case no day is given to the infant (Hutton v. Mayne, 3 Jon. and Lat. 586; 1 Law Stud. Mag. N. S. 294, explaining

Price v. Carver, 8 Myl. and Cr. 157, and overruling Clibborn v. Forstall, 5 Ir. Eq. Rep. 531).

X. Production of title deeds by mortgagee.—A mortgagor cannot require the mortgagee to produce title deeds except by paying, or offering to pay him, off (2 Daniell's Pract. 1683—1685, 2nd ed.; Browne v. Lockhart, 10 Sim. 420).

XI. Steps of a Chancery suit.—The progressive steps of a Chancery suit commenced by bill up to the hearing are as follows: the filing of a printed copy of the bill, preceded, if an injunction, &c., be prayed, by a written copy; the service thereof on the defendant; the appearance of the defendant; the filing of interrogatories to the bill and service of a copy thereof on the defendant or his solicitor; the answer, demurrer, or plea of the defendant; the obtaining of time to answer, if needed, which is almost invariably the case; the inspection of documents in the possession of either defendant or plaintiff; the plaintiff is then advised on the sufficiency of the defendant's answer, and if not deemed sufficient, exceptions are taken, set down, and argued in court; the plaintiff either sets the cause down without filing replication, and in that case gives a notice of motion for a decree, or he files a replication; the parties then enter into evidence, which may now be wholly or partly affidavit or oral, and afterwards the cause, being set down, is brought on for hearing.

XII. Taking evidence.—The practice of taking evidence in equity by interrogatories is abolished, except that the court may order any particular witness or witnesses to be so examined. In the absence of such direction the evidence is taken either by affidavits or by oral examination before examiners (15 & 16 Vic. c. 86, ss. 28, 29). Since this act the orders of the 13th of January, 1855, have directed that when issue is joined the plaintiffs and defendants respectively shall be at liberty to verify their respective cases, either wholly or partially, by affidavits, or wholly or partially by the oral examination of witnesses (see 1 Law Chron. 337, 338).

XIII. Mortgage, how viewed at law and equity.—A mortgage in the eye of a court of law is a conveyance of the estate subject to its being divested on payment at the day; the land is regarded as the principal, the debt only as an accessory. In equity the mortgage is but a partial disposition, or, rather, incumbrance; it is there looked on as a debt, the land being a mere surety or security for the payment of the money (Key, div. "Equity," p. 27, 3rd edit.).

XIV. Tenant for life paying off mortgage.—Where a tenant for life pays off a mortgage he will be entitled to the benefit of it, but it is best to take an assignment or transfer of the mortgage for his own benefit (see Story's Eq. Juris. pl. 486; Merrif. Watkins, 267).

XV. Purchase money of settled estate taken by railway company.—By the Lands Clauses Consolidation Act, 1845, s. 69; where the purchase or compensation money for lands taken or damaged by a public company amounts to £200 or upwards, the money paid into the bank may be applied—1, in the purchase or redemption of land-tax, or the discharge of any debt or incumbrance affecting such land; 2, or in the purchase of other lands to be settled to the old uses; 3, or if the money be paid in respect of buildings taken or injured by the works, in removing or replacing such buildings, or substituting others in their stead; 4, or in payment to any party becoming absolutely entitled to such money.

ARTICLED CLERKS.

ALTHOUGH we thought we had, in a little paragraph at p. 151, given ample explanation respecting the literary examination (so we call it, to distinguish it from the one on law), that it would not apply to any but *future* articulated clerks, we have received many communications from present clerks expressing their fears that, as they had not been examined in law, they would have to undergo the literary examination. We repeat, that only clerks *hereafter* articulated are to be subject to the literary examination, and we may add, that at present such examination is but in contemplation, as the proposal has not yet been made to the judges, or, at least, has not been adopted by them.

We frequently are requested to give information respecting articulated clerks, their service and admission; in future, when the inquiries are of sufficient general interest, we propose to give insertion to them here:—

1st. Can an articulated clerk, whose term will expire the first part of September next, be examined in Trinity Term next—that is to say, conditionally? If not, must he give notice in Trinity Term of his intention to offer himself for examination in Michaelmas Term?

[This is a matter of much importance to articulated clerks, and having often been asked the same question, we have made a point of sending to the Law Institution, and have there been informed that the clerk *cannot* be examined until Michaelmas Term. We do not think this is strictly correct, at least, not where the clerk has actually served his whole time, but we know that it has always been the conclusion arrived at and acted on by the secretary to the Incorporated Law Society].

2nd. As his first master died suddenly, and two or three months elapsed before an assignment could be completed, will the examiners compel him to enter

into fresh articles for such two or three months? It is thought not, as the clerk, prior to his being articulated, had been several years in the same office under the solicitor to whom he was articulated, and had charge of the office during the two, or three months above mentioned. There will also lapse about two months between the termination of his articles and the examination. Under all the circumstances, what will be the best course to adopt?

[The fact of the clerk having been in the office several years prior to the articles will not be of avail; but if the clerk has continued to serve the solicitor for the two or three months of interregnum it will suffice; but the mere fact that the two or three months have elapsed since termination of the articles will not suffice].

3rd. Who is the proper person to make the necessary affidavits as to due service under his first master.

T. E.

[The clerk is the proper person in all cases to make the affidavit of due service].

Would you kindly favour me with your opinion, whether it is *absolutely* necessary that the affidavit of due execution of articles of clerkship should be made by the master and a clerk (not the one articulated), or whether it would be sufficient for such clerk *only* to make the affidavit (he being a witness attesting the signatures of the parties) and stating that the solicitor to whom the clerk is articulated was duly admitted, &c.; the articles of clerkship having been entered into in 1855. And if the latter made defective, how to remedy same.

OMICRON.

NOTE.—We see no difficulty about the matter: the act (6 & 7 Vic. c. 73. s. 8) requires the attorney to whom the clerk is bound to make, or *procure to be made*, an affidavit of such attorney having been admitted; it is therefore sufficient if any person, who can, swears that the attorney has been duly admitted. We know that in point of practice it often occurs that a third person, *i. e.*, the attesting witness to the signatures of the attorney and clerk, takes upon himself to swear that the attorney has been duly admitted, though some more scrupulous persons make the attorney himself depose to that matter.—EDS.

THE BILLS OF EXCHANGE SUMMARY ACT.

(ante, pp. 63—65).

This act is now in operation, and, as will be seen by our summary, some decisions have already taken place upon it. In addition there is the great point as to costs, there being no mention of them in the form of indorsement on the writ given by the statute,

Some persons have supposed this to be unnecessary, for that the attorney might put on a separate indorsement of the costs, but this has not met with general acceptance, others seem to think that the legislature intended that persons availing themselves of the summary remedy given by the act should do so at their own expense in case the defendant paid within the time limited by the indorsement. But this seems scarcely probable, and it would seem that the omission of the costs was an oversight. Already one application, at least, has been made to the court respecting this costs question, and before long some decision on it must be arrived at by the courts, and if it be decided that costs cannot be claimed it will render the act almost a dead letter, for parties will not avail themselves of a proceeding for which they will have to pay out of their own pockets. In the *Legal Observer* of the 17th of November we find the following observations and statements, which may be serviceable to our readers:—

"Amongst the Common Law Practitioners much doubt still continues on the subject of the new summary procedure on the Bills of Exchange Act, in regard to the right of charging the amount of the costs of the writ of summons, on payment of which within *four* days, with the principal and interest, or the balance of the bill or note, proceedings may be stayed. In many cases, in consequence of this doubt, the former mode of proceeding is adopted; but several practitioners fill in the blank of the number of days, and insert such costs as were allowed under the Common Law Procedure Act, according to the distance at which the writ had to be served or the charge for agency. Only one case on a rule *nisi* has yet come before the court which we shall presently notice.

"There may be doubts regarding the necessity of making rules and orders to render the matter clear, because ere long the point will be judicially decided on the construction of the new act, aided by its incorporation with the Common Law Procedure Acts of 1852 and 1854; but it will be recollected that it is somewhat perilous to apply to the court on the subject, for it is not likely that the defendant who resists the payment of a reasonable charge will be allowed the costs of the application; and in all probability the plaintiff would be allowed to amend the indorsement—if perchance the indorsement should not be sanctioned.

"The better opinion," so to speak, of Westminster Hall, we believe to be, that the indorsement of costs, either by express rule of court, or by the concurrent decision of the superior common law courts will be sanctioned and approved, as the manifest intention of the legislature. It could never be intended to give (as the act professes) the holder

of a dishonoured bill a better and speedier remedy than formerly at his own expense, and thus relieve the defaulter of all the costs of his breach of contract. Surely this is too absurd to be even suggested.

"*Summons to stay proceedings on payment of debt without costs.*—In his lecture in the hall of the Incorporated Law Society, on Friday last Mr. Kerr mentioned an application under the statute which had on that day been made at chambers. The summons was taken out by the defendant, and called upon the plaintiff to show cause why, on payment of the amount of the bill and interest and expenses of noting (no costs being mentioned), further proceedings should not be stayed. On examination, it appeared that the writ was endorsed exactly in the form prescribed by the statute. No costs were claimed by the endorsement, and the number of days was left *blank* as in the form given in the schedule. Mr. Baron Martin said he thought the writ irregular by not having the blank for the number of days filled up, and he said that "four" ought to be inserted as in ordinary cases. This objection, however, was not taken by the defendant, and ultimately the learned Baron made an order that the plaintiff should be at liberty to amend the writ as he thought fit, so as to leave the defendant to take the opinion of the court. Mr. Baron Martin declined to interfere; but he suggested that the writ, besides the endorsement giving a copy of the bill required by the statute, should be amended by having the indorsement required by section 8 of the Common Law Procedure Act, 1854, also inserted. It was in explaining the object and effect of this indorsement, that Mr. Kerr mentioned what had occurred at chambers, and we deem the suggestion of Mr. Baron Martin of so much importance that we feel bound to call the attention of our readers to it. In this indirect way, the difficulty as to "costs" may perhaps, be got over. In addition to this, we may mention that Mr. Baron Platt and Mr. Justice Crowder, as the judges of the Common Pleas of the County Palatine of Lancaster made rules at the August assizes, in which (after setting out several provisions of the new act) the indorsement of the writ is amended by inserting in the blank of the schedule *four* days, and adding to such indorsement "£ *for costs.*"

We trust the other judges will concur in this construction of the statute, and make rules and orders for carrying the new act into effect, under the ample powers of the Common Law Procedure Acts, with which this act is incorporated.

It will be observed that the defect only extends to the costs of the writ, and that only in case the defendant should pay on being served with the process, for if he fails to pay within the time limited by the notice on the writ, the plaintiff will, on signing

judgment, be entitled to his costs. As to these we may observe that the masters have fixed the costs of the final judgment for default of appearance, as follows:—

"As to Costs, &c., under the Bills of Exchange Act.—In pursuance of the "Summary Procedure on Bills of Exchange Act, 1855," we the undersigned Masters of the Superior Courts of Common Law, have fixed, subject to the approval of the Judges of the said courts (which has since been given), the following sums for costs, to be allowed in cases in which the plaintiff has signed final judgment for default of appearance, viz:—

"ABOVE £20.

"Agency on country cases, including mileage	£4	0	0
Town cases	8	8	0

"UNDER £20.

"Agency on country cases, including mileage	£3	2	0
Town cases	2	14	0"

LAW REPORTING—WEEKLY REPORTER DIGEST.

THE editors of the *Weekly Reporter* have issued their annual digest of cases from Michaelmas Term, 1854, to the sittings after Trinity Term, 1855, as reported in their own and other legal reports. The volume is a very useful one, and gives a good idea of the extent of information to be found in the *Weekly Reporter* itself, as a very considerable proportion of the cases is to be found in that work. They have also issued the title-page of the volume of the *Reporter* for 1854—1855, with tables of names of cases there reported, and having reference to contemporaneous reports where the decisions have appeared. A glance at the table of cases will show that in the greater number of instances the decisions are reported in some six or seven different reports—i. e., that the profession are burthened with so many reports of some of the decisions, and it will be found that in not a few of these cases the points decided were by no means important. Our present object is to call attention to the preface given with this table of cases, in which the editors say:—

"The *Weekly Reporter* was originally commenced for the purpose of supplying an important desideratum in professional literature. The want of an accurate and succinct account of cases decided in the superior courts, published in a cheap form and at an early period, had been long felt; and the attempts which had been made to meet it were either of too ambitious a character, or encumbered with other matter without interest for the profession generally. From all such objections the *Weekly Reporter* is

free; and although aiming primarily at supplying the desideratum above mentioned, it has succeeded in furnishing a body of trustworthy reports, which will be scarcely superseded by slower and more extensive publications. The very circumstances under which the reports are produced tend to ensure their practical character. No time is allowed for any of those elaborate processes by which cases are manufactured and almost created by the ingenuity and diligence of the reporter, and every fact, relevant or irrelevant, scrupulously set forth. The attention of the reporter who has immediately to produce his record must be steadily directed to ascertain what is necessary and essential in the case presented to him, and he is under no temptation to allow his ingenuity to run riot or to stuff his report with accumulations of all sorts of matter. In all these respects, from the unwearied zeal and diligence of the reporters, the *Weekly Reporter* has been successful; and the position which it occupies may fairly be considered as resulting not only from its lowness of price and rapidity of publication, but from its really furnishing valuable and satisfactory reports of cases decided in the superior courts of equity and law.

At the present moment the subject of law reporting is in a somewhat precarious and unsettled state. The old system, dragging its slow length along, is universally condemned—a result mainly attributable to the appearance and success of the *Weekly Reporter*. Various new schemes have been proposed—joint stock companies—officers appointed by the Crown—an index expurgatorius adopted by the courts, and several other projects of greater or less wisdom. But whatever the results of present movements may be, they will scarcely touch the liberty of unlicensed printing, and the Editors of the *Weekly Reporter* feel that, as long as they are favoured with the services of gentlemen of the same ability, learning, and industry as those who now supply the reports, their publication must stand its ground amidst all mutations, and that its unquestionable advantages and acknowledged merits—its rapidity, its cheapness, its accuracy, its soundness, its careful Digest and its copious references, must command success."

The references to other reports in which the cases "are manufactured and almost created by the ingenuity and diligence of the reporter," and the statements that a reporter of the *Weekly Reporter* is not under the temptation to allow his "ingenuity to run riot or to stuff his report with accumulations of all sorts of matter," are very good hits, though it may be thought not very kind of the editors to allude to the defects of their contemporaries, or to puff their own reports at the expense of the others. The fact is that reporting is in a sad condition, and all con-

cerned in it know so, but the difficulty is to find an effectual remedy. In the meantime it is well to keep the subject before the attention of the profession.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ELECTION.—*Will*—*What is an election to take under a will?*—Two things are essential to constitute a settled and concluded election by a person who takes an interest under a will which also disposes of property belonging to that person: there must be, in the first place, knowledge on the part of the person put to his election of the nature and extent of his rights; and in the second place, there must be an intention to elect. However, as Alexander C. B., in *Edwards v. Morgan* (18 Price, 782), said, "a party can never be held by the court to have made an election and to be bound by it, where it is not clear that he was fully apprised of the nature and extent of his own rights, as well as of those of the person claiming against him and who seeks to compel him to elect, and that the election ought to have been made, and was actually made, and that it was apparent from the acts and conduct of the party." This gives a rule for determining whether or not an election has in any given case been made. The following case shows what amounts to an election:—Previously to the execution of his will, a testator transferred a sum of consols, then standing in his own name, into the joint names of his wife and himself. By his will, he bequeathed this sum of consols, and all other stock of which he might die possessed, together with certain freehold and leasehold premises to his wife for life, with remainder over. He gave his residuary estate to his wife absolutely, and appointed her sole executrix. His widow proved the will, and transferred the stock standing in their joint names into her own name, and added to such stock by subsequent purchases on her own account. The testator had no stock standing in his own name alone. The widow did not include the stock in the estimate of the testator's personal estate made for the purpose of probate. She enforced payment of money due to the testator's estate, which she retained for her own use, and she entered into an agreement to surrender the leasehold premises. She also received the rent of one of the freehold houses, and resided in the other up to the time of her decease. In contemplation of her second marriage, she entered into an agreement to settle the whole of the stock standing in her own name in trust for herself for life for her separate use, with power of disposition by will. She made her will, by which she gave her property generally to

W.: Held, that under the circumstances, and particularly the facts of the receipt of the rents of the freehold houses, to which, *except under the will*, the widow was not entitled, and that she continued so to receive them during her whole life, the widow must be taken to have known that she was bound to elect.: Held also, that she elected to take under the will. *Worthington v. Wiginton*, 1 Jur. N. S. 1005.

EQUITY PRACTICE.

DISMISSAL OF BILL [1 Chron, pp. 21, 239, 305].—*Setting down cause where defendant has not answered*—*Chancery Amendment Act, sec. 27*—29th order of August, 1852—*Costs*.—In a case where a defendant was not required to answer, and had not answered, and the plaintiff had not served notice of motion for a decree or set down the cause for hearing within three months, the court directed that the cause should be set down within seven days or stand dismissed with costs; and even if so set down, the plaintiff should pay the costs of a motion to dismiss for want of prosecution. *Waters v. Thorne*, 26 Law Tim. Rep. 57.

LUNATIC.—*Answer of committee, binding lunatic's estate*—*Evidence*—*Documents admissible not necessarily conclusive in all respects*.—In the following case some discussion arose in the House of Lords as to the office and powers of a Lunatic's Committee in reference to his answer being read against and being binding on the lunatic and his estate. The Lord Chancellor considered that the answer could not be read against the lunatic so as to bind his estate, for the committee was nothing but a bailiff, deriving his authority from the grant of the Crown, whose duty it was to protect the rights and interests of the lunatic (*Beverley's case*, 4 Coke's Rep. 127 b). That grant conferred no estate on the committee, but merely gave him authority to do such acts as would protect the interests of the lunatic. His powers were limited to that purpose. A power to bind the lunatic was not essential for his protection. It was conceded, his Lordship said, that the grandson of a person of weak mind not so followed by inquisition could not bind the party and in principle there was no difference between a committee and such a guardian. On the other hand Lord St. Leonards was clearly of opinion that the answer of the committee could be read so as to bind the lunatic, though possibly not conclusive on him—his Lordship admitted that the committee was called a mere bailiff of the Crown, but he said it did not follow therefrom that they did not represent the estate in the character of committee: he was a bailiff for the purpose of accounting; and though the grant did not vest the estate itself in the committee; it placed him on the footing of a representative of the lunatic and the

estate. His Lordship referred to the following authorities as supporting his views, *Lering v. Calverley*, Prec. Chanc. 229; *Freeman v. Grady*, 8 Ir. Eq. Rep. 137, per M. R.; *Crawford v. Kernaghan*, 1 Dru. and Warr. 195; 1 Dan. Prac. 246. This point was not necessary to be decided, but it was decided that as against the committee, who had become entitled beneficially under the lunatic, and had become defendant to a suit in the place of the lunatic, his answer as such committee might be read against him; and further that though there had been no replication filed to such answer, it could not be considered as conclusive, for there is no rule, either at law or in equity, compelling the court to take as conclusive any statement made by either of the parties, merely because it was admissible in evidence. The facts of the case were as follows:—Mrs. P. filed a bill against S. and V., the committees, and C., a lunatic, alleging that she had given moneys to C. to invest as trustee; L. and V. put in their answer on behalf of C., admitting that Mrs. P. had for years put forward such a claim, and that S. on one occasion, in C.'s presence, wrote out a memorandum signed by Mrs. P., whereby the amount alleged to be due was fixed, and setting forth the memorandum, but that S. believed that C. was then of unsound mind, and that S. had since, for the sake of peace, on C.'s behalf, paid dividends due on the amount so fixed. On C.'s death S. and Mrs. V. were her administrators, and on a bill of revivor being filed against them they admitted assets, and prayed leave to refer to the former answer of S. and V. the committees, and craved the benefit thereof, and no replication was filed: Held, the answer of the committees could be read in evidence against the administrators, who were substantially the same individuals as the original defendants, but that it was not to be assumed as conclusive merely because no replication had been filed, and decree made accordingly that C. was a trustee for Mrs. P., and the defendants must pay the amount fixed by the memorandum. Whether the answer of a committee of a lunatic can bind the lunatic in the life time of the latter? Per Lord Cranworth, that it cannot; Per Lord St. Leonards, that it can. *Stanton v. Percival*, 26 Law Tim. Rep. 49.

COMMON LAW.

STOLEN NOTE.—*Negligent holder for value.*—*Notice.*—By all the cases down to *Gill v. Cubitt* (3 Barn. Cr. 466), a person taking a negotiable instrument in good faith, and for value is entitled to recover on it, although he may have the means of knowledge that it has been stolen, of which he has not availed himself, and his title cannot be impeached by the infirmity of title of the person from whom he takes

it. Not taking heed of the notice may be negligence, but that is not sufficient. This principle has been applied to the case of a Bank of England note, and is one of some importance. Where in an action on a bank-note which had been stolen, the jury found the plaintiff was a *bona fide* holder for value, that he had received a printed notice of the theft, but that at the time he took the note he had no knowledge though he would have had if he had properly taken care of the notice: Held, that upon this finding the plaintiff was entitled to recover. *Raphael v. The Governor and Co. of the Bank of England*, Week Rep. 1855-6, p. 10; 26 Law Tim. Rep. 60;

FIXTURES [1 Chron. p. 417].—*Trover for fixtures—Incoming and outgoing tenant.*—Generally speaking, fixtures are taken to be part of the freehold, and not to be such chattels as are the subject of trover. Various exceptions have been ingrafted upon this rule, with respect to matters ornamental, and with respect to matters that are fixed for the purpose of being used in particular trades, or for various particular special purposes; and as to these there are many distinctions, some of them nice and intricate enough, which have been established. (*Colegrave v. Dios Santos*, 2 Barn. and Cr. 76; *Pitt v. Shew*, 4 Barn. and Ald. 206). In *Trappes v. Harter*, (2 Cr. and Mees. 153), Lord Lyndhurst is reported to have said that "the screwing of a stocking frame to the floor to keep it steady would not make it a fixture," but this has been doubted (*per Parke Baron in Marshall v. Lloyd*, 2 Mees. and W. 456). In the following case, the plaintiff, an outgoing tenant, had left on the premises, which consisted of a warehouse, the following fixtures, viz. a crane, a bench, and a ladder. The crane was screwed on to the warehouse top and bottom, to keep it steady, the bench had a flap, which was hung on a piece of wood nailed to the wall, and the ladder was fixed to the ground and to a beam above, and was the only communication between the ground and upper floor of the premises: Held, that there was nothing peculiar to these to exempt them from the general rule as to fixtures, they not being ornamental nor fixed in any special, but quite in the ordinary, mode and for the ordinary use of the premises to which they were affixed, and that they were, therefore, not such in respect of which an action of trover could be obtained. *Wille v. Waters*, Week Rep. 54-5, p. 570; 1 Jur. N. S. 1021.

COMMON LAW PRACTICE.

AMENDMENT [1 Chron. pp. 127, 163, 310, 418].—*Declaration in trespass turned into one in case*—*Power to amend form of action at trial* [1 Chron. p. 16]—*Common Law Procedure Act, 1854* (17 & 18 Vic. c. 125, s. 36).—We have before (1 Chron.

p. 65) alluded to the new practice of not inserting the form of action either in the writ or the declaration, but as will appear by the following case, the declaration must be properly framed just as though the form of action were expressly stated. The court will, however, amend the defect where no injustice will result from it. For by sec. 96 of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125) "it shall be lawful for the judge sitting at nisi prius to amend all defects and errors in any proceedings, and all such amendments as may be necessary for determining in the existing suit the real question in controversy between the parties shall be so made if duly applied for." This section extends the power of amendment given by sec. 222 of the act, which by its recital is confined to mistakes and objections of forms (see 1 Chron. 16). In an action of trespass to try the title to a close, it appeared that the close was in the occupation of a tenant of plaintiffs:—Held, that the judge had power under sec. 96 of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125) to amend the declaration by making it a declaration in case, instead of trespass. *May v. Footner*, Week Rep. 55—6, p. 9; 1 Jur. N. S. 1019; 26 Law Tim. 58.

BILLS OF EXCHANGE.—*Summary Procedure on Bills of Exchange Act*, 1855 (18 & 19 Vic. c. 67 ss. 1, 7; ante, pp. 63—65)—*Amendment of indorsement on writ*—15 & 16 Vic. c. 76, s. 20.—The 18 & 19 Vic. c. 67, s. 1, enacts that "from and after the 24th October, 1855, all actions on bills of exchange or promissory notes commenced within six months after the same shall have become due and payable may be by writ of summons in the special form contained in schedule (A.) to this act annexed, and indorsed as therein mentioned," schedule (A.) after giving the form of writ, continues:—

"Indorsement to be made on the writ before service thereof.

"This writ was issued, &c.

"Indorsement

"The plaintiff claims £ principal and interest [or £ balance of principal and interest] due to him as the payee [or indorsee] of a bill of exchange or promissory note, of which the following is a copy:—" [Here copy bill of exchange or promissory note, and all indorsements upon it]." A writ issued under sec. 1 of the above act by the indorsee against the maker of a promissory note, omitted the makers name in the copy of the note, indorsed upon it, as required by that section and schedule (A.). Upon a motion by the defendant to set aside the copy of the writ served upon him, the service, and all subsequent proceedings for this defect, the court, under the 20th section of the Common Law Procedure Act, 1852, which enacts that if any of the

matters required by that act to be indorsed on process is omitted, the writ or copy is not to be void, but it may be set aside as irregular, or be amended on application to the court or a judge, ordered the writ and copy to be amended, and the service to stand good, the plaintiff to pay the costs of the application. *Knight v. Pocock*, 1 Jur. N. S. 1022; 26 Law Tim. Rep. 61; Week. Rep. 1855-6, p. 10.

BILLS OF EXCHANGE [ante, pp. 63—65].—*The Summary Procedure on Bills of Exchange Act*, 1855, 18 & 19 Vic. c. 67—*Leave to defend, ex parte application*.—The application under sec. 2 for leave to defend is an ex parte application, but if the judge is dissatisfied with the affidavits, he will only grant an order nisi in the first instance. *Fück v. Glover*, 26 Law Tim. Rep. 59.

NEW TRIAL.—17 & 18 Vic. c. 125, s. 31—*Insufficient stamp* [1 Chron. 159].—The 17 & 18 Vic. c. 125; s. 31, which enacts that "no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp," does not apply where, on an objection being taken to the sufficiency of the stamp on a document, the judge, with consent of the parties, abstains from expressing an opinion on the point, and reserves it for the decision of the court above, who were to order a nonsuit if they should be of opinion that a stamp was necessary. *Eames v. Smith*, 1 Jur. N. S. 1025; Week. Rep. 1855-6, p. 9.

BANKRUPTCY AND INSOLVENCY.

DISCHARGE BY CREDITOR [1 Chron. 349].—*Intermission of imprisonment between petition and hearing*—*Discharge by detaining creditor*—*Insolvent on sureties*.—Where a discharge is lodged at the prison by an insolvent's detaining creditor the evening before the day named for hearing, but he comes up with the other prisoners, not having gone out of custody, the court will exercise a discretion as to pronouncing an adjudication. Where an insolvent is out on sureties the court will also exercise a discretion under similar circumstances. *Re Ostermar*, 26 Law Tim. Rep. 64.

PROTECTION PETITION.—*Books, invoices, and receipts*.—The court does not require an insolvent's receipts to be filed, as they are the vouchers for past payments, but all his books and invoices must be lodged with the petition and schedule. *Re Okey*, 26 Law Tim. Rep. 64.

COMMON LAW TAXING MASTERS.—A kind of movement is being made for increasing the salary of the Common Law Taxing Masters, they having but £1,200, whilst the Equity Taxing Masters have £2,000.

CRIMINAL PROSECUTIONS IN CITIES AND COUNTIES.

An instructive correspondence has passed between the auditors of the accounts of the Norwich Town Council and the Lords of the Treasury on the difference between the expenses of criminal prosecutions in the county of Norfolk and the city of Norwich. The following statistics are quoted by the auditors:—

"County of Norfolk.—Session, Jan. 5, 1853.—
'The Queen, on the prosecution of Roger Matthias Kerrison, against Elizabeth Baldwin,' for felony:—

COSTS OF THE PROSECUTION.

For the Justices' Clerk's fees and expenses, certified by the committing magistrate	£2 17 0
For three witnesses, two days, at 3s. 6d. per day	1 1 0
For one county constable ditto, at 2s. 6d. per day	0 5 0
For prosecutor's travelling expenses, four miles	0 2 0
For two witnesses' ditto, ditto	0 4 0
For one ditto, nine miles	0 4 6
For court fees, indictment, and crier	0 7 0
For this order.....	0 2 0

£5 2 6

"By the court—Parmeter, Clerk of the Peace—allowed; Henry Dover, Chairman."

"City of Norwich.—Session, Jan. 5, 1853.—'The Queen on the prosecution of Richard Adcock, against James Wallistone,' for misdemeanour:—

COSTS OF THE PROSECUTION.

Attorney for attendance and brief... £1 1 0	
Ditto copies of information and examination.....	0 5 0
Ditto counsel and clerk's fees	1 3 6
Clerk	1 5 0
Police for apprehension.....	6 15 3
Oaths to three witnesses before grand jury	0 1 6
Oaths to four witnesses	0 4 0
Oath to one witness for prisoner	0 1 0
Filing six recognizances	0 6 0
Filing four examinations	0 4 0
Indictment	0 3 6
Abstracting	0 1 0
Calling, swearing, and counting jurors	0 4 0
Recording plea, &c.	0 7 0
Discharging recognizances and notices	1 7 0
Filing justices' certificates of allowance	0 2 0
Order for gaoler.....	0 3 0
Taxing costs	0 2 0
Order for prosecutor's allowance	0 1 0

Order for four witnesses' allowance...	0 2 0
Jury bailiff	0 1 0
For loss of time of prosecutor and two witnesses	4 4 0
Edward Peek	0 3 6

£18 7 8

"By the Court—Staff, Clerk of the Peace—allowed; M. Prendergast, Recorder."

THE LAW INSTITUTIONS AND ASSOCIATIONS.

In the publication called the *Legal Observer*, and which being edited, or, at least, owned by a solicitor, styles itself, *par excellence* "the Solicitors' Journal," in the course of an article entitled "Means of Improving the Second Branch of the Profession," some notice is taken of the Law Institution, and also of a society which on its first establishment was very distasteful to the *Legal Observer*, viz: "The Metropolitan and Provincial Law Association," and as some of our readers may not be acquainted with the matters there stated, they may like to be furnished with the information. Whether the opinion that the Solicitors should adopt a separate incorporation from the bar will be acceptable generally we cannot tell; certainly it looks more independent than seeking for admission into the Inns of Court Law University—which is the course suggested by the *Law Times*:—

"The Commissioners on the Inns of Court and Chancery propose to establish a law university, composed of the four inns of court, from all of which the attorneys and solicitors were excluded about thirty years ago. From that time to the present, the members of the second branch have been steadily and constantly at work to supply the means of legal education and secure and advance their status in the profession at large. At first a few hundred gentlemen associated themselves by a deed of settlement under the name of "the Law Institution," subscribed £50,000, purchased land, erected a handsome building, and in 1831 procured a charter of incorporation. An extensive library was formed, and in 1833 several courses of lectures were commenced. Nearly £100,000, has been invested in the whole, exclusive of the annual expenditure. In 1836 the examination was instituted under rules and orders of the courts of law and equity. In 1843 the Incorporated Law Society was appointed registrar of attorneys; in 1845 they obtained a new charter,—the shares being relinquished and the joint-stock part of the institution being converted into a society of a collegiate character.

"Improvements have been effected in the plan of the examination, and it is now proposed to require

classical as well as legal proficiency. It has also been suggested that some distinction should be conferred on those candidates for admission on the Roll who pass the examination in a superior manner. These suggestions have been favourably received by, and are under the consideration of, the proper authorities.

"Our notion at present is, that instead of struggling to be included in the contemplated Law University, the attorneys and solicitors should simultaneously with the measure for establishing a bar-university, apply for an incorporation of the whole body as a *College of Attorneys and Solicitors*, like the College of Surgeons.

"It will be recollected that in the year 1847, a new society of attorneys and solicitors was established under the name of "The Metropolitan and Provincial Law Association," whose proceedings have been constantly recorded in our pages. That society was formed in order to associate the country with town solicitors—comparatively few of the former being enrolled in the Incorporated Law Society (the admission fee to that society was then £15, afterwards reduced to £10 in regard to country members, and now to £5); and to effect other objects, not within the scope of the chartered society. Every attorney and solicitor in England was addressed no less than three times, during the first year, on the objects of the society, the grievances of the profession, and the improvements required. About one-tenth in number joined the association, but notwithstanding the annual and other exhortations addressed by the committee to their brethren, great apathy continues to prevail amongst the profession at large.

"A further means of exciting attention and arousing the practitioners, especially in the country, has been recently adopted (it appears that of the London solicitors no less than 1200 are members of the Incorporated Law Society). Besides the general meeting of the Metropolitan and Provincial Law Association, held annually in London, in the month of April, a meeting is held in the month of October, in one of the principal country towns. At the meeting which took place at Derby in 1854, it was proposed that at the succeeding meetings should be read and discussed papers on professional subjects; and at the last October meeting this suggestion was carried into effect, and the result has been printed by the Metropolitan and Provincial Law Association."

BARON PARKE A PEER.—According to the ministerial paper, Baron Parke is to be created a peer as *Baron Amphil*, which will enable him to give his valuable assistance on appeals to the Lords.

THE LIABILITY OF HOTEL-KEEPERS.—A point in the legal question of the liability of hotel-keepers for the safe custody of the property of their guests was involved in a case, "*Cashill v. Wright*," tried at the Manchester Court of Record before the Recorder, on Saturday. The plaintiff is a commercial traveller, and the defendant the keeper of the Spread Eagle Hotel, Corporation-street. The plaintiff had been in the habit of staying at the hotel when he came to Manchester. When there, one night in June last, he left the door of his bedroom partially open, and missed his gold watch, and found that £4 or £5 in gold had been taken from his trousers. He then went downstairs and found the night porter asleep. It turned out that, about 4 o'clock in the morning, the porter had admitted into the house a man in the guise of a traveller, who pretended that he had just come into Manchester by the train, but who was really one of those thieves by whom so many hotel robberies were committed in Manchester just about that time. After being shown into a bedroom, he had gone into that occupied by the plaintiff, possessed himself of the watch and of what cash he could meet with, and then, finding the porter asleep and the key in the front door, he had effected an easy escape. He was afterwards apprehended for a similar robbery, to which he pleaded guilty at the sessions; and among the property recovered on his apprehension was the cap of the plaintiff's watch. The plaintiff now claimed £45 damages. Mr. Owens, for the defendant, contended that there had been such negligence on the part of the plaintiff, short of gross negligence, as entitled the defendant to a verdict; and, after a discussion upon this point, the Recorder directed the jury to find whether the plaintiff had been guilty of gross negligence; if so, their verdict must be for the defendant; and, otherwise, for the plaintiff, with such damages as would cover the loss which it was proved he had sustained by the evidence given as to the value of the watch, in addition to the money stolen. After a short consultation in court the jury retired, and in half an hour they returned into court with a verdict for the plaintiff—damages £25. Subsequently Mr. Wheeler, one of the defendant's counsel, applied to the court for leave to move for a new trial on the ground that the Recorder ought to have directed the jury to find whether there had been negligence, without gross negligence on the part of the plaintiff, which would have entitled the defendant to the verdict. The Recorder gave leave, and the judgment is therefore set aside until the defendant shall have had an opportunity next Hilary Term to make the necessary application to the superior court.—*Liverpool Post*.

THE BANKRUPTCY LAW.

(Continued from p. 178).

Form of declaration by bankrupt or his wife.—The following is the form of declaration to be taken by a bankrupt or his wife as given in Schedule W. to the act and referred to in sec. 260, set out ante p. 178.

The Bankrupt Law Consolidation Act, 1849.

Form of Declaration to be made by the Bankrupt or the Bankrupt's Wife.

I, A.B., the person declared a bankrupt under a fiat in bankruptcy, dated the day of [or under a petition for adjudication of bankruptcy filed on the day of in the year of our Lord] [or I C.D., the wife of A.B., declared a bankrupt under a fiat in bankruptcy dated the day of or under a petition for adjudication of bankruptcy filed on the day of], do solemnly promise and declare, that I will make true answer to all such questions as may be proposed to me respecting all the property of the said A. B., and all dealings and transactions relating thereto, and will make full and true disclosure of all that has been done with the said property, to the best of my knowledge, information and belief.

(Signed) A. B.,

[or C. D., the wife of the said A. B.]

Although a person attends at the appointed time, in pursuance of a summons, but does not wait to be examined, or if he neglects or refuses to produce a document as directed, a warrant may, it seems, issue under this section (*Wright v. Maude*, 10 M. and W. 527). But a refusal on the part of a witness to read an entry in an account book put into his hands is not such a refusal to answer a question as is within the section (*Isaac v. Impey*, 3 Y. and J. 38; 4 C. and P. 113).

A witness, who from conscientious motives only, not being a member, or entertaining the principles of, the Society of Friends, or belonging to the denomination of people called Separatists, cannot object to be sworn when the oath is tendered; and it is not permitted by law that any such privilege shall extend to a witness so situated and refusing. Upon the objection being persisted in, the witness will be committed to prison; and the court has no discretion but to exercise its authority; but the solicitor prosecuting the inquiry may waive the oath, and the witness will then be discharged from custody and examined without it (*Ex parte Laurence*, 20 Law T. 16).

The 260th sec. very fully defines the four cases in which a bankrupt may be committed by the court upon his examination: namely, 1. If he refuses to make and sign a declaration; 2. If he refuses to answer any lawful question put to him by the com-

missioner; 3. If he do not fully answer any such question to the satisfaction of the commissioner: and 4. If he refuses to sign and subscribe his examination.

Where a bankrupt, on the day appointed for his last examination, promised to produce a balance-sheet, if further time were given, several adjournments took place, during a period of ten months, at which adjournments he represented an account in writing to be necessary in order to make the discovery required of his estate and effects, and he promised from time to time to produce the balance-sheet; and that not being produced at the last adjournment, and no satisfactory reason given by him for not producing it, excepting merely his assertion that he had not committed an act of bankruptcy, and that therefore the commissioners had no authority to examine him, the commissioners committed him: it was holden that they were justified in so doing; his conduct amounting to a refusal to answer a question put to him by the commissioners touching a matter relating to his estate (*Davie v. Mitford*, 4 B. & A. 356). So, where the last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account, which he referred to as the only mode of explaining his trade and dealings; and the last adjournment was made upon his assurance that he would produce such account if further time were given: it was holden that, as the account was not produced, nor any satisfactory reason assigned for not having produced it, on the day to which the adjournment was made, the commissioners were justified in committing him (*Stanley v. Goddard's case*, 1 Glyn & J. 49). But where the bankrupt was asked if the statements contained in a written paper shewn to him were true, and the bankrupt demurred to the question, on the ground that his answer might expose him to a criminal prosecution, it was held he was justified in demurring to a question in so general a form, and to any particular of it which tended to criminate him (*Ex p. Kirby*, 1 Mon. & M'A. 212). But it is now held, that the bankrupt is bound to disclose his property, although his answer may tend to convict him of concealing his effects (*In re Heath*, 2 Dea. and C. 214; *In re Feak*, Id. 226; *In re Smith*, Id. 230). And though a bankrupt cannot refuse to discover his estate and effects and the particulars relating to them, merely because by giving information on the subject his answers may tend to show that he has been guilty of fraudulent concealment, or because he owns property which he has obtained illegally or the possession of which will render him liable to penalties (*ex parte Cousens*, 1 Buck. 531), yet he has been held protected from answering questions as to a distinct criminal act (see *re Smith*, 2 Dea. and Ch. 239; *re Elliott*, 1 Fonbl. 78; *Wise's Bankr.* 280, 2nd edit).

As to the not fully answering questions to the satisfaction of the commissioner, there are no technical rules by which cases of this kind are determined; the question in each particular case is, whether the answers given by the bankrupt be or be not sufficient to satisfy the mind of any reasonable person (Per Lord Kenyon, in *Exp. Nowlan*, 6 T. R. 118; per Lord Eldon, in *Goddards case*, *supra*). If a bankrupt swear to an account of the disposal of his property, which appears incredible, it is unsatisfactory within the meaning of the statute, and the commissioner may commit him (*Exp. Nowlan*, 6 T. R. 118; per Lord Eldon, in *Exp. Oliver*, 2 V. & B. 244; 1 Rose, 407; re *Martin*, 4 Dowl. & L. 768; 1 De Gex, 485). It is sufficient that the answers on the whole are unsatisfactory (*Exp. Lord*, 16 Mees. & W. 462; 16 Law Journ. Ex. 118). But the commissioner is bound to point out to the bankrupt the answers which are not satisfactory, and press the points, in order to enable him to put them in a more satisfactory view (*Exp. Lee*, 2 Mon. & A. 15). Where a bankrupt, upon his examination, being asked to account for deficiency in his estate of £13,513, said that he had lost upwards of £2,000 on goods sold and upwards of £1,000 by mournings, and that for the last nine or ten years, he was sorry to say, he had been extremely extravagant, and spent large sums of money: this was holden to be unsatisfactory, and that the commissioner had rightly committed him (*R. v. Perrot*, 2 Burr. 1122). Afterwards he gave, as a further answer, that he had given to a woman whom he had kept, and whose name he mentioned, but who was since dead, the sum of £5,000 in one year; that he drew this money, not from his banker, but from one Thompson, who sold goods for him, and who was also since dead: it was holden that this answer also was incomplete and unsatisfactory, and he was again remanded (*Id.*; 2 Burr. 1215). So, where a bankrupt, in accounting for a deficiency in his estate, said that he had paid £400 in order to prevent the discovery of a connexion he had with another man's wife; that he had paid it to a man who had threatened to disclose the affair, but that he did not know the man's name, or where he lived; that he received notes from him, threatening such disclosures unless he gave him money, but he had destroyed the notes; that he had received the notes by the hands of a boy, but that he did not know the boy: these answers were not deemed satisfactory enough by the Lord Chancellor to induce him to discharge the bankrupt, whom the commissioners had committed, but he recommended them to have the bankrupt again called before them, for the purpose of asking him further questions, which he suggested (*Exp. Oliver*, 2 Ves. and B. 244; 1 Rose, 407).

A bankrupt having made, upon his examination an improbable statement respecting his going to Southampton and disposing of part of his property there, was committed; upon being brought up again before the commissioner, he admitted that a portion of his former statement was false, but as to the remainder of his examination he said there was nothing that he could remember to correct, but he wished to do so. The commissioners thereupon asked him what were his intentions in going to Southampton, to which he answered "to rest, and arrange with his creditors." The commissioner expressed his dissatisfaction with the answer, pointing out the incredibility of it, and then reiterated the question. The bankrupt in substance adhered to his former reply, and the commissioner committed him on the ground that he had not answered to the satisfaction of the court: Held, that he was warranted in doing so under the above 260th section (*Legge*, *ex parte* 1 B. C. C. 163, 17 Jur. 415; 22 Law Journ. Q. B. 345). A bankrupt on his examination before a commissioner in answer to the question "not having kept any books, does your memory serve you as to how the £100, the proceeds of a cheque drawn by the bankrupt, payable to the Rev. W. B., was appropriated" replied "not now:" Held, that the commissioner was justified in committing the bankrupt to prison for not fully answering to his satisfaction, under the above 260th section (*Bradbury*, *ex parte*, 14 C. B. 15; 18 Jur. 189; 23 Law Journ. C. P. 25).

But where a bankrupt, to a question whether he had not executed two conveyances of his estate and effects, or a part thereof, to his son, within six months previous to the commission, answered, "Not to my knowledge," and no further question was asked: this was holden to be satisfactory (*Norris's case*, 2 Jac. and W. 437). So, where a bankrupt, being asked if he had bought certain silks by a broker, answered, that he could not possibly recollect whether he had or not, and being pressed again with the question, answered, that he should rather believe he had: these answers were holden to be satisfactory (*Miller's case* 3 Wils. 427; 2 W. Bl. 881). So, where the bankrupt was directed by the commissioners to communicate to his assignees where certain debtors to his estate were to be found, and was afterwards asked, upon his examination, if he had given his assignees any such information, and if not, why not? to which he answered, "I have not; and can give no reason why:" and he was thereupon committed: it was holden that he should not have been committed; for the commissioner can only commit for not giving a satisfactory answer to a question put by himself, and not to questions, how-

ever relevant and material, put by any other person delegated by him (*Exp. Cassidy*, 2 Rose, 217).

Warrant.—If the bankrupt refuse to be sworn, or refuse to answer, or answer unsatisfactorily, or refuse to sign his examination as above stated, the commissioner may commit him to such prison as he shall think fit.

The commitment must be under the hand of the commissioner and the seal of the court, and is directed to the messenger (who need not be named, *ex parte* Lord, 16 Mees. and W. 462), and also to the keeper of the gaol to which the bankrupt is committed, and "his deputy there." It states the filing of the petition for adjudication,—the adjudication,—the notice in the Gazette,—the surrender of the bankrupt,—and the several adjournments of his examination, and then his last attendance for the purpose of passing his examination; it then states, either that he refused to be sworn, or that he was sworn, and states the questions put to him, and alleges either that he refused to give any answer, or "any other than the following answer, that is to say," and then setting out the answer, and alleging it not to be satisfactory to the commissioner; and it then concludes with ordering the messenger to take him into custody, and convey him to the prison, and ordering the gaoler to receive him, and to keep and detain him safely, "without bail, until he shall submit himself to such court to be sworn, and full answers make to the satisfaction of such court to all such lawful questions as shall be put to him by the court and sign and subscribe such his examination." Where the warrant was, "till he conform to our authority," it was holden bad (*Bracy's case*, 1 Salk. 348; 1 Ld. Raym. 99). Where the warrant concluded, "or otherwise be discharged by due course of law," it was holden bad (*Hollingshead's case*, 1 Salk. 351; 2 Ld. Raym. 851). And where the bankrupt was committed for refusing to sign his examination, and the warrant authorized the gaoler to detain him "until he should submit himself, and full answer make, to the satisfaction of the commissioners, to all such questions as should be put to him, and sign and subscribe" his examination, it was held bad: it being an authority to retain him until he should answer, which by the warrant it appeared he had already done (*ex parte*, Leake, 9 B. and C. 234). But in a similar case, where the warrant concluded "until he shall submit himself to us, &c., and shall sign and subscribe his examination," it was held proper, the then statute (5 Geo. 2, c. 30, s. 16) requiring a submission to sign, &c. (In the matter of Davison, Mon. & M'A. 443).

Committal for refusal to answer or for not fully answering—Specifying questions in the warrant.—Where a bankrupt is committed for refusal to answer

or not fully answering any questions, every such question must be specified in the warrant. This is by sec. 261 of the Consolidation Act, which enacts:—That if any person be committed by the court for refusing to answer or for not fully answering any question put to him by the court, such court shall in its warrant of commitment specify every such question; provided that if any person so committed shall bring any *habeas corpus* in order to be discharged from such commitment, and there shall appear on the return of such *habeas corpus* any such insufficiency in the form of the warrant whereby such person was committed, by reason whereof he might be discharged, it shall be lawful for the court or judge before whom such person shall be brought by *habeas corpus*, and such court or judge is hereby required, to commit such person to the same prison, there to remain until he shall conform, unless it shall be shewn to such court or judge by the person committed that he has fully answered all lawful questions put to him by the court, or if such person was committed for refusing to be sworn, or for not signing his examination, unless it shall appear to such court or judge that he had a sufficient reason for the same: Provided also, that such court or judge shall, if required thereto by the person committed, in case the whole of the examination of the person so committed shall not have been stated in the warrant of commitment, inspect and consider the whole of the examination of such person whereof any such question was a part; and if it shall appear from the whole examination that the answer or answers of the person committed is or are satisfactory, such court or judge shall and may order the person so committed to be discharged.

It is not sufficient for the commissioners to set out the answer complained of, and the question to which it was given, and declare that to be unsatisfactory to them, but they must also furnish sufficient matter, on the face of their warrant, to enable the judge to exercise his judgment upon it, in case the bankrupt should be brought up by *habeas corpus*. Not only the question to which an unsatisfactory answer is given must be set out, but if the answer appears unsatisfactory only by reference to some other part of the examination, that part should be also stated (*Walker's case*, 1 Glyn & J. 311); indeed, in strictness, perhaps, the whole examination should be set out; at least, if it appear upon the face of the warrant that other questions were put which are not set out; as, if it state that the following questions "amongst others" were put, or the like, the warrant will be bad (*Tomlin's case*, 1 Glyn & J. 373; *Lawrence's case*, 2 Glyn & J. 209; see also *Crawley's case*, 2 Swan. 1; *Bromley's case*, 2 Jac. & W. 453).

And where, upon the questions and answers reference was made to documents contained in a previous examination, but which documents are not set forth in the warrant (Price's case, 2 Glyn & J. 211), or to some previous examinations not so set forth (Hooton's case, 2 Glyn & J. 215; re Martin, 4 Dowl. & L. 768; 1 De Gex. 485), the warrants were held to be defective, for the warrant ought to exhibit to the court the same information as was possessed by the commissioners; but where the transaction which is the ground of commitment appears complete upon the warrant, and unconnected with the documents or examination referred to, the omission to set them out does not vitiate the warrant (Atkinson's case, 2 Glyn & J. 218). But in other cases, the questions on a former examination need not be set out, it being sufficient to set out those in the examination which are considered unsatisfactory (*ex parte* Dauncey, 4 Q. B. Rep. 668). Where the warrant expressed the commitment to be "for not answering a question," and it appeared by the examination to be for having refused to read entries in a ledger, which the party had referred to in his examination, but had no notice to produce, the warrant was held bad in form and substance (*Exp. Isaac*, Mon. & M'A. 22).

But the above section extends only to the two cases of commitment mentioned in it; namely, for refusing to answer, and for not answering fully. Therefore, it is no objection to a warrant of commitment for refusing to be sworn, that it does not state the reason given by the bankrupt for his refusal (Nobes v. Mountain, 3 B. & B. 233), or that it does not set out any specific questions (*Exp. Page*, 1 B. & A. 568).

Re-examination and Re-commitment.—If the bankrupt wish to purge his offence, and submit himself to the court, he should send notice to that effect (*Per Buller, J.*, 1 T. R. 654), and the commissioner will thereupon grant his warrant to have him again brought before him; and if the meeting is held for any other purpose, he may be brought up at such meeting without paying the costs of the meeting; but the bankrupt is not entitled to a meeting for the purpose of his re-examination without paying the costs of the sitting, notwithstanding his affidavit of his inability to pay (*re Stockwin*, 5 Adol. & E. 266; but see *ex parte*, Cohen, 18 Ves. 294). But in a case where the bankrupt had been imprisoned upwards of twelve months and was utterly destitute, and the assignees had ample funds, the court ordered him to be brought up for re-examination at the expense of the estate, notwithstanding he had been brought up twice before, and had been indicted for perjury and concealment of his estate (*Exp. Croyley*,

3 Dea. 392; 1 Mon. & C. 40; but see *ex parte Rothery*, 1 De Gex, 565).

When the bankrupt is thus again brought up, he is examined as before; and if he still refuse to be sworn, or refuse to answer, or answer unsatisfactorily, or refuse to sign his examination, the commissioner may re-commit him. And, in this case, there must be a new warrant; for if remanded upon the original warrant, he would be entitled to be discharged (*Exp. Coombs*, Cook, 454; 2 Rose. 396; *Exp. Brown*, Cook, 454; 2 Rose, 400; re Martin, *supra*).

Habeas Corpus. If the bankrupt have been properly committed, he can obtain his discharge only by submitting to the commissioner, as above mentioned; he will not be discharged merely on the ground that a further examination can be of no use to the creditors (*Ex p. Nowlan*, 11 Ves. 511), or the like. If, on the other hand, the bankrupt have been improperly committed, his remedy is by habeas corpus (*Ex p. Tomkinson*, 10 Ves. 106), which may be obtained upon motion in the Court of Chancery, or in any of the common-law courts at Westminster, in term time, or by application to the Lord Chancellor or any of the judges in vacation (See *Crowley's case*, 2 Swanst 1). Notice of the application, however, must be given to the assignees, in order that they may oppose his discharge if they think fit; and notice on the Saturday afternoon for the Monday following will be deemed insufficient, unless the case be very clear (*Bromley's case*, 2 Jac. and W. 453). It is not the practice to grant a certiorari to bring up the whole of the bankrupts examination under the above 261st section (*exp. Bradbury*, 18 Jur. 189; 14 Com. Ben. Rep. 15).

When the bankrupt is brought up, in pursuance of the writ, the cause of his commitment, that is to say, the warrant, is returned upon it, and the judge then examines into its validity. And, as we have seen, it is provided by sec. 261, that the bankrupt is not to be entitled to his discharge, because, in the return to the writ, the warrant of committal appears imperfect; the court will ascertain if the warrant is truly set forth in the return, and if it is not, will then order the return to be amended (*Power*, 2 Russ. 583). And by a habeas corpus the party may object that the question was illegal, though he did not so object when before the commissioner (*Exp. Bardwell*, 1 Mon. and A. 207); and affidavits may be read as to facts not apparent upon the face of the warrant (*Exp. Lampon*, 3 Dea. and C. 751. 1 Mon. and A. 245, re Martin *supra*).

ON JURISPRUDENCE.

In the course of a rather long and not very practical article in the last number of the *Law Review*, there are some very useful remarks upon jurisprudence, which will, we think, repay a careful reading, and we therefore place them in our pages.

Jurisprudence and positive law explained.—The term jurisprudence has been used in very different senses; originally it meant knowledge of the principles of law, or skill in its practice. In the Institutes of Justinian the science is defined to be the knowledge of what is just and unjust. Upon the revival of learning in Europe, jurisprudence was used to signify knowledge of the Roman law. The term has also been used in a sense borrowed from the French to imply a collection of the principles belonging to particular branches of the law, thus, equity jurisprudence, maritime jurisprudence. The term has also been used to signify the whole body of the law of a state, thus, the jurisprudence of England.

The possibility is now admitted of arriving at a complete science of law, or science of right. Or, in other words, the possibility is admitted of collecting and arranging in methodical order the fundamental principles which explain the origin of laws and their development towards perfection. Some term is necessary to denote the science of law, and we shall so employ the word jurisprudence. No science can be possibly developed without nomenclature and classification,—

“Nomina astant, perit et cognitio rerum.”

By law is here understood positive law, that is, the law existing by position, or the law of human enactment; jurisprudence is the science of positive law, and as such is the theory of those duties which are capable of being enforced by the public authority. Jurisprudence, so treated, may take its place as one of those inductive sciences in which, by the observation of facts and the use of reason, systems of doctrine have been established which are universally received as truths among thoughtful men.

But jurisprudence in its investigation of the origin, principles, and development of law, obviously furnishes rules which teach men to acknowledge and select good laws and to shun evil laws. Hence jurisprudence is not only the science of positive law, but is also the art of legislation.

Since science is conversant about speculative knowledge only, and art is the application of knowledge to practice, jurisprudence when applied to practice, whether in the making of laws as in legislation, or to the actual working of the law as in advocacy, is an art, but jurisprudence, when confined to the theory of law, is strictly a science.

The same term may be strictly applied to both the science and its corresponding art, as logic is not only the science of thought but also the art of reasoning; so that we may give an example taken from the practice of the law, conveyancing is the science and also the art of alienation. If by an investigation of the laws of property we elicit and systematise the principles which govern its disposition, we are then forming the science. If we apply this knowledge in the alienation of property, we are skilful in the art. The art may exist without the corresponding science having arrived at any degree of cultivation; for if the knowledge applied to practice be merely accumulated experience, it is empirical, but if it be illustrated by history and philosophy, and brought under general principles, it becomes a scientific art. Thus, Lord Coke was an empirical lawyer; his writings are a chaos of ill-digested learning; Story was a scientific jurist of the highest class, who in his works rises from rules of practice to the principles of eternal justice.

Positive law and municipal law explained—Blackstone's mistake as to municipal law.—Positive law is the law of human enactment. It is called positive as existing by position. “Inde enim positiva dicta est quasi addita naturali legi non ex illa necessario manans. Unde ab aliquibus jus positum vocatur” (Suarez De Legibus, lib. 1, cap. ciii. sec. 13). With former jurists, and before the importance of international law was recognised, positive law was held to mean the sovereign government of an independent political society. It must now be taken to include also international law, so far as the latter is capable of being ascertained and enforced. For positive law is distinguished from all others enumerated by jurists or moralists by the element of compulsion to obedience through the public force.

Sir William Blackstone and others have termed this species of law municipal law. But the term is inappropriate. Derivatively, the word “municipal” refers to a corporate town. Blackstone defines municipal law—or, as it should be termed, positive law—as a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.

Now, the error of this definition is, that a law prescribed by the supreme power in a state is still a law, even though it does not correspond with the latter part of this definition, and command what is right and prohibit what is wrong. The essence of a positive law is compulsion by the public authority; and provided the force of a state be employed to compel obedience to any rule of civil conduct, such rule is a law. There have been evil laws in all ages, yet they have not the less been laws. Internal

positive law is therefore a rule of civil conduct prescribed by the supreme power in a state.

It is defined a rule, in order to distinguish it from anything in the nature of a sudden command, a request from an inferior, an advice from a friend, or a compact between equals. It is termed a rule of civil conduct, that it may be distinguished from the rules of moral conduct with which as such the public law does not interfere. The criminal branch of positive law does not punish vices, only crimes. The civil branch of positive law is concerned with the maintenance and enforcement of private rights, where the violation of them has not affected directly the public security. Individual wickedness is not punished directly by the law except where it interferes with the happiness of others in a manner of which the laws can take cognisance. The prodigal may squander his fortune in dissipation; the fool may waste it by reckless mismanagement; the miser may bury it from his friends and the world; but the law is unable to enforce prudence in dealing with one's own, or benevolence towards others. Such things must be left to the progress of knowledge and education. For justice alone, of all the virtues, can be enforced by the public authority. Again, the rule of law is prescribed—that is, promulgated by the official power of the State, and in the last resort, enforced. Laws, to be obeyed, must be known. Yet ignorance of the law must never be permitted to be urged as an excuse for any accountable citizen. *Ignorantia juris neminem excusat.* It would be absurd to permit any man to profit by his ignorance of the law, so as to place himself in a more advantageous position than another, who did not neglect to make himself acquainted with those rules to which every member of the society ought to conform.

Four classes of rights and duties.—The different rights and duties incident to man in civilised society divide themselves naturally into four classes: 1. Rights and duties arise between individuals in such a manner that the community is not immediately concerned with them; 2, Rights and duties arise between individuals in such a manner that the community is immediately concerned with them, and immediately suffers by the infringement of the natural rights of man; 3, Rights and duties arise between individuals and their governments; 4, Rights and duties arise between different states, and form the province of international law.

Civil, criminal, political, and international jurisprudence.—In accordance with this fourfold division of positive law, jurisprudence is divided into four parts termed respectively civil, criminal, political, and international. Civil jurisprudence is concerned with those rights which are sufficiently protected by awarding compensation to the injured party. Crimi-

nal jurisprudence punishes the violation of a right on behalf of the community where in many cases no compensation can be awarded. Political jurisprudence embraces the province of Government, and its relations to the people. International jurisprudence divides 'itself' under two heads, public and private, according as it defines and adjusts the mutual rights of individuals of different states, or the mutual rights of the governments of different states. Within its last sphere are included the greatest social and political problems of the age.

Common and statute law.—The whole body of the law has been commonly divided into common and statute, or unwritten and written. The body of the common law is the collection of rules recognised by the members of the community without any positive interference of the legislative power. Statute law is the law prescribed and promulgated by the supreme power in the state. Both common and statute law fall under the denomination of positive law. They both spring from the same authoritative force—the will of the community. And custom is the sign by which we recognise that common law which arises and grows amongst a people as naturally and necessarily as their language. The common law is not the production of the brain of one legislature, it is the growth of time and circumstance, the offspring of the necessities which the manners, religion, and circumstances of a nation have imposed (Burke's Works, vol. x. p. 555), antecedent to all law enacted by the supreme legislative power. Antecedent to the existence of the legislative body in a state, its inhabitants are governed by customs, spontaneously arising and binding by the force of public opinion. These ancient customs of the people must be recognised by the judges, as much as the general expression of their will through their representatives in the legislature, and must equally with the statutes of a realm be considered as positive law.

Common law as administered by the judges.—The common law system of England, as administered by the judges of the land, consists in applying to new combinations of circumstances those rules of law which are derived from legal principles and judicial precedents; for the sake of attaining uniformity, consistency, and certainty, these rules must be applied by the judges, where they are not plainly unreasonable and inconvenient, to all cases which arise, and the judges are not at liberty to reject them, and to abandon all analogy to them in those cases to which they have not yet been judicially applied because they may consider that the rules are not so convenient and reasonable as those which they themselves could have devised (*Per Mr. Justice Parke, in Mulhouse v. Rennell*, 8 Bingham's Reports, 515). However important it may have been under the early feudal

governments that the judges should have been strictly tied up by the precedent, in the present day, in a free country, with judges of the independence and integrity attained in modern times; with the publicity of justice, and the liberty of the press as security against corruption, it does not seem necessary that the judges should be so bound by the ancient strict rules of precedent, many of which might usefully be relaxed in the progress of society.

SOLICITORS LIEN FOR COSTS.

Solicitor and client—Lien extends to costs of enforcing bill of costs by action—Lien on several estates and parting with deeds of one estate—Taxation—Marshalling—Securities.—A case of considerable importance upon the subject of the lien of a solicitor has been decided in the House of Lords upon appeal from Scotland. The points decided were, 1. that where a solicitor has a lien upon his client's deeds for costs incurred by him, and the client upon application refuses to pay those costs, and the solicitor is driven to bring an action for them, the lien extends (see *Lambert v. Buckmaster*, 2 Barn. and Cres. 616), as well to the costs of enforcing the bill of costs, as to the costs incurred by the client himself. 2. Though a solicitor who has a lien for his costs on his client's deeds, has in an action for the untaxed bill of costs obtained judgment and thereafter acquired the rights of a real creditor, yet in a question between the solicitor and other real creditors having otherwise a prior security on the same estate, the latter are not precluded even after the lapse of a considerable time from insisting upon taxation of the bill of costs. 3. Where a solicitor has a lien in respect of his costs over all the title-deeds of his client, the client having several estates, the solicitor, in parting with the title-deeds of one of those estates, does not lose his lien in the proportion which the value of such estate bears to the value of the whole estates, but he preserves the lien entire upon the remaining estates. 4. A solicitor having a lien upon the title-deeds of his client's estate, if retained by a lender to prepare a security for money to be advanced to the client (the borrower) on such estate, is bound to inform such lender of the existence of his own lien, because otherwise he is deceiving his own client by leading the lender, who is as much his client as the borrower, to suppose that he is giving him the security of the estate free from any lien on his part; if the solicitor do not disclose his lien he will be estopped from setting it up against the borrower. *Gray v. Graham*, 26 Law Tim. Rep. p. 111.

ARTICLED CLERKS—ARTICLES NOT DULY ENROLLED.

In addition to the case already noticed *ante*, p. 168, the following may be noted where the articles not having been duly enrolled within the proper period of six months, and the solicitor having died, permission was granted to enrol the articles *nunc pro tunc* and the service to reckon from the execution of the articles. Counsel moved for an order that the affidavit of the execution of the applicant's articles might now be filed, and that the date of his service might be reckoned from the execution of his articles of clerkship. It appeared that this gentleman was articulated on the 6th May, 1854, on which occasion the articles were duly executed. He continued to serve under them until May last, when his master died. Since then he has been assigned to another attorney, upon which it was discovered that there was no affidavit of the execution of the original articles, and that the articles themselves had not been enrolled. The applicant deposed that he was not aware of the omission, and that it was entirely the neglect of his master. The application to the court was made under the provision of sec. 9 of the 6 & 7 Vic. c. 73, and Crompton, J., granted it.

ARTICLED CLERKS' HONOURS.

Some of our readers are aware of the discussion which took place some time ago and the efforts which were made by one at least of our subscribers to have examination honours conferred on the most successful candidates, and we are glad to hear that there is a chance of this plan being speedily realized. It is pretty generally known that at the examination which takes place each term in the hall of the Incorporated Law Society, the master who presides is accustomed to address the candidates on the regulations which they are called upon to observe, the duties they will have to perform when admitted on the Roll of Attorneys, and the important and honourable character of the profession which they seek to enter. In the last term, Master Pollock, in addition to the usual remarks suited to the occasion, adverted to the desirableness of awarding some honorary notice of the candidates who distinguished themselves by their answers, and expressed a strong opinion in favour of establishing some standard of merit to be attained by those candidates who aspired to honourable mention of their names. We understand that a plan for carrying this suggestion into effect is under the consideration of a committee of the Incorporated Law Society. It will be recollected indeed, that a committee of that society has already reported in favour of a classification of the candidates,

as appears in the appendix to their last annual report. We presume that due notice will be given of the proposed change in this respect, if it should be adopted,—and which will, of course, be first submitted to the judges for their sanction. We understand that the masters of the several courts generally approve of the suggestion.

FEEES OF SPECIAL JURORS.

By a report in the daily papers of the 11th of December last, it appears that a special jury cause in the Queen's Bench having been withdrawn without the jury being called, one of the gentlemen who had been summoned to attend in that case as a jurymen, asked the Lord Chief Justice if they were not to receive anything for the trouble and inconvenience which they had undergone in coming down to the court at an early hour in the morning. They were heavily fined if they did not attend, and it was very hard that after waiting the whole of the day they would be dismissed without any recompense. Lord Campbell said, it was a most reasonable application. It was highly improper that they should be dismissed without being paid the small recompense which the law awarded them if they were called into the witness-box. If notice had been given to the jury on Saturday that they would not be wanted, it would have saved them a great deal of unnecessary trouble in attending here to-day. Having been made to attend under penalty of being fined by the judge they really ought to be paid when an arrangement was entered into, and the amount made one of the terms of the arrangement. The rule had been laid down before, that when the jury were summoned and an arrangement come to they ought to be paid. It was a reproach upon the administration of justice that the jurors, upon whom such an onerous and important duty devolved, should, after having, in fulfilment of that duty, attended all day, be treated in such a shabby manner. He could only inform those gentlemen that he had no power to interfere, but he would consult his brother judges as to whether they could not of their own power lay down that the record should not be withdrawn, the jury being summoned, without the jurors were paid. The attorneys in the case subsequently undertook that the jurors should be paid as if they had been sworn.

SATURDAY HALF-HOLIDAY.

This movement is progressing in every direction both in town and in the country. Thus at a meeting of solicitors, held of the Incorporated Law Society,

Chancery Lane, on the 1st December, 1855, it was resolved 1st, that the resolutions of the public meeting held at Guildhall, on the 15th day of August, be submitted to the council of the Incorporated Law Society, with a request that they would solicit an interview with the Lord Chancellor and the judges of the equity and common law courts, and that they invite the movers and seconders of the different resolutions passed at that meeting, and such other gentlemen as they may think fit, also to attend with them at such interview. 2nd. That at the interview to be solicited, the deputation do urge the Lord Chancellor and the judges to take or sanction the necessary measures for establishing that the hour of 2 o'clock on Saturdays shall be considered henceforth to be the close of that day for conducting legal business in all its branches, and impress upon his lordship and the judges, that its early closing on Saturdays is earnestly sought, not by the legal profession only, but by the public at large. 3rd. That Mr. Smith be requested to communicate with the council of the Law Society as to the selection of gentlemen to be invited to attend at the interview.

(Signed) T. J. RIDSDALE, *Chairman*.

The following is the principal of the resolutions passed at the public meeting above referred to, held at the Guildhall of the city of London, on the 15th August last, Sir James Duke, Bart., in the chair,—at which meeting upwards of 4,000 were present:—

2nd. That this meeting considers that the hour for closing on Saturdays so far as is practicable, should be two o'clock, believing that the government, law, public, and other offices, and wholesale houses generally may, compatibly with public convenience be closed at that hour; and therefore strongly urges the adoption of this measure.

EXAMINATION ANSWERS.

(*Michaelmas Term, 1855*).

BANKRUPTCY (*ante*, pp. 189, 190).

I. *Dates of recent statutes*.—The two latest statutes respecting bankruptcy are the Consolidation Act of 1849, and the 17 & 18 Vic. c. 119, passed in 1854 and called "the Bankruptcy Act 1854" (see 1 Chron. pp. 30, 40, 137).

II. *Adjudication*.—In order to obtain an adjudication of bankruptcy at the instance of a creditor, the creditor must present to the proper court a petition for adjudication signed by him, and attested by the solicitor acting for him in the bankruptcy. This must be accompanied by an affidavit that the allegations in the petitions are true—i. e., of the debt, that the debtor is a trader within the meaning of the bankrupt laws, has committed an act of bankruptcy,

and resides within the district. Within three days after the filing of the petition—i. e., the three days in which the petitioning creditor has priority, or any enlarged time, the petitioning creditor must prove his debt, the trading, and the act of bankruptcy. The petitioning creditor must personally attend to prove his debt, except on a certificate of ill health from his medical attendant, or where it is shown to be very expensive. The commissioner must examine into the nature and consideration of the debt, and, before declaring the party a bankrupt, must cause to be entered on the proceedings a deposition of such petitioning creditor stating the nature and amount of the debt due, and how and for what consideration the same arose, together with the particular time or times the same became due. The trading and act of bankruptcy must be proved. Witnesses may be summoned to give evidence (12 & 13 Vic. c. 106, s. 100). After the proofs of the petitioning creditor's debt, and of the trading and act of bankruptcy by the party against whom the petition was filed, the commissioner may adjudge such person bankrupt, of which, however, he is to have notice before it is advertised (Mont. and Ayr. Pract. chap. 11; Edens Bankr. Law, chap. 5; 12 & 13 Vic. c. 106, s. 101).

III.—*Petition for protection—Deed of arrangement.*—A trader may effect arrangement with his creditors and be discharged from his debts either by petitioning the Court of Bankruptcy for protection from arrest (12 & 13 Vic. c. 106, ss. 211), or by his entering into a deed of arrangement with his creditors. (*Id.* s. 224). In the case of a petition for protection from arrest, the petitioning trader must have assets to the extent of £200. On the presentation of the petition duly verified, without obtaining the concurrence of the creditors, the commissioner will grant the trader protection, and order his release if in custody except in certain specified cases. The trader afterwards makes a proposal, which must be assented to by three-fifths in number and value of the creditors who have proved to the amount of £10 (12 & 13 Vic. c. 106, s. 213, 215). When the resolution or agreement has been carried into effect, the court is to give a petitioning debtor a certificate thereof; and such certificate is to operate as a certificate of conformity, except only that any debt which shall have been contracted wholly or in part by reason of any manner of fraud, or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue-laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy, shall not

be barred by such certificate. Where the second course above-mentioned is pursued, namely, an arrangement by deed, the consent of six-sevenths in number and value of the creditors to the amount of £10 must be obtained (12 & 13 Vic. c. 106, ss. 224, 225; 1 Law Stud. Mag. N. S. 257—262).

IV. *Requisites to support adjudication.*—The requisites to support a petition for adjudication on the petition of a creditor are 1. a good sufficient debt; 2. an act of bankruptcy; 3. a trading by the debtor so as to make him a trader within the meaning of the bankrupt statutes (Key div. "Bankruptcy," pp. 46, 49).

V. *Notice of and disputing adjudication.*—Previous to the notice of adjudication appearing in the *London Gazette*, a duplicate of such adjudication must be served on the person so adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person. The party so served is allowed seven days or such extended time, not exceeding fourteen days, as the court shall allow, from the service of such duplicate of such adjudication, to show cause to the court against the validity of such adjudication. On appeal to Lords Justices the advertisement may be further stayed (2 Law Stud. Mag. N. S. p. 3). If the petitioning creditor's debt, the trading, or the act of bankruptcy appear insufficient, and none other be proved, the adjudication is to be annulled; but if no cause be shown for annulling the adjudication, the notice of adjudication is to be forthwith advertised, and sittings appointed for bankrupt to surrender and conform (12 & 13 Vic. c. 106, s. 104).

VI. *Petitioning creditor's debt due.*—The petitioning creditor's debt must have been contracted before the act of bankruptcy, but no adjudication is invalid by reason of any act or acts of bankruptcy prior to the debt or debts of the petitioning creditor or creditors or any of them, provided there be a sufficient act of bankruptcy subsequent to such debt or debts (12 & 13 Vic. c. 106, s. 88). The object of this enactment is to prevent an adjudication regularly obtained being defeated by prior acts of bankruptcy. A debt payable at a certain future time, if contracted either in writing or verbally, upon a valuable consideration will support an adjudication, though the act of bankruptcy be committed between the contract and day of payment (12 & 13 Vic. c. 106, s. 91; Archb. Bankr. 72; 14 East, 197; Madd. 72; 2 Law Stud. Mag., N. S., Supplem. p. 179).

VII. *Debts provable.*—The general rule is, that all debts may be proved under a bankruptcy for which, if payable at the time, the creditor might have had his remedy against the bankrupt, either at law, in equity, or otherwise, in his own name, or in the name of any other. There must be a debt, of an

amount either actually ascertained, or which may readily be ascertained by computation, without the intervention of a jury, and not a claim sounding merely in damages, and those damages unliquidated. Indeed, it may be stated as the result of very many cases on this intricate subject, that where damages are contingent and uncertain, as in *some* cases of demands founded on *contract*, and in *all* cases of *torts*; where both the right to any damages at all, and also the amount of them, depend upon circumstances, of which a jury alone can properly judge, and which, therefore, it requires the intervention of a jury to ascertain, such damages are not capable of proof, except so far as secs. 177 and 178 of the Consolidation Act give a right to prove. But in cases where, although the usual form of action which a creditor would have for his demand, may be one in which he would recover it in the shape of damages to be given by a jury; or though, perhaps, in some instances, he could have no other kind of action; yet if his demand is of such a nature as admits of being liquidated, and ascertained at the time of the bankruptcy, so that he can swear to the amount, he will be entitled to prove (See 5 Law Stud. Mag. 255).

VIII. *Proof—Verdict—Award.*—Where a verdict for the plaintiff is taken subject to an award, the award afterwards made in favour of the plaintiff, relates back to the time of the verdict, and, therefore where a verdict is obtained for a *debt* or other liquidated demand against a person before a bankruptcy subject to a reference, and the award is made after the bankruptcy, the amount awarded is provable by the plaintiff (Archb. Bank. 112—114, 8th edit., pp. 136—139, 10th edit.). Indeed, it is said that if a verdict be taken in an action of *tort*, subject to a reference, and the award is made after the petition, the amount awarded is provable: but this seems doubtful (Beeston v. White, 7 Price, 209, cited 1 Mont. and Ayr. Bankr. 291, 2nd edit.; see 3 Law Stud. Mag. N. S. p. 188; 1 Law Chron. p. 19; 2 *Id.* p. 180).

IX. *Proof—Policy of insurance—Bottomry bond.*—By the Consolidation Act, s. 174, the obligee in any bottomry or respondentia bond, and the assured in any policy of insurance, made on valuable consideration, shall be admitted to *claim*, and after the loss or contingency shall have happened, to *prove* his debt or demand in respect thereof and receive dividends with the other creditors, as if the loss or contingency had happened before the filing of the petition for adjudication against such obligor or insurer; and the person effecting any policy of insurance upon ships or goods with any person (as a subscriber or underwriter) having become or becoming bankrupt, shall be entitled to prove any loss to which such bankrupt shall be liable in respect

of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person so interested is not within the united realm.

X. *Proof—Bond or bill not payable.*—By the Consolidation Act, s. 172, any person who has given credit to the bankrupt on valuable consideration for any money or other matter or thing which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit was given on a bill, bond, note, or other negotiable instrument or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and *receive dividends* equally with the other creditors, *deducting only thereout a rebate of interest* for what he shall so receive at the rate of five pounds per centum per annum, to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted. On the similar section in 6 Geo. 4, c. 16, it was held that the amount of a proof on a debt payable *in futuro* is not subject to this rebate of interest, which only applies on payment of a *dividend* on the proof (Exp. Hill, 2 Deac. 249; S. C. 3 Mont. & Ayr. Rep. 175).

XI. *Proof—All liability parties to bill bankrupt.*—If the drawer, acceptor, and first indorsee of a bill of exchange all become bankrupts, a second indorsee holding the bill for a valuable consideration, may prove the whole amount against each estate, and receive dividends thereon from each of the estates against which he has proved, provided that he do not receive more than 20s in the pound upon the amount actually due to him (Exp. Dyer, 6 Vesey, 9; Exp. Adam, 2 Rose, 36; Exp. Wildman, 1 Atkyns, 109; Archb. Bankr. Pract. 132, 10th edit.). And where there are solvent parties to the bill, the holder may, notwithstanding his proof against the bankrupt parties, proceed at law against them (Archb. Bankr. Pract. 132, 10th edit.; Henley's Bankr. 155, 3rd edit.). Where the creditor *before* proof has received a part of the bill from any of the persons liable to pay it, he can only prove for so much as remains (Exp. Wildman, 2 Vesey, 113; Exp. Worrall, 1 Cox, 309). See where goods deposited as security to meet bill, 17 Jur. 1083.

XII. *Proof—Equitable mortgages.*—An equitable mortgagee should not prove if his security be worth anything until he has realized same, for on proof he would have to give up his security for the benefit of the estate. He should go before the commissioner, have an account taken of what is due to him in respect of his security and obtain an order for sale and for the application of the produce, if insufficient to pay all his claim in part reduction of his demand and

for leave to prove for the residue (Rules of 19 Oct. 1852, pl. 17, 55): This, however, where there is no power of sale cannot be done where there is a subsequent claimant of the equity of redemption who will not consent (*Exp. Topham*, 1 Madd. 38). It is to be understood that where there is a power of sale, whether the mortgage be legal or equitable, the mortgagee may sell without going before the commissioner or obtaining an order, but it is more usual to sell under the bankruptcy, as then the assignees will be compelled to join in the conveyance (if necessary), and leave to bid may be obtained (*Lingard v. Bromley*, 1 Ves. and Beam. 115; *exp. Davis*, 1 Mont. and Ayr. 89).

XIII. Proof—Equitable mortgagee without writing.—Where an equitable mortgagee has a writing he is entitled to his costs of the application for sale, but if there be no writing, except under special circumstances, he is not entitled to such costs. There is otherwise no difference, except of course that any writing may have a power to sell in it, and be so available as above-mentioned.

XIV. Assignees liable to rent of bankrupt's premises.—By electing to take the premises the assignees make themselves liable to the covenants, and among those, that, of course, for payment of rent, until they part with the lease by assigning it over, which they may do even to a pauper (1 Barn. and Ald. 36; 1 Merivale, 253; 2 Madd. 330; 1 Mont. and Ayr. Rep. 94; *Princ. Com. L.* 108, 110).

XV. Reputed ownership.—In order to render goods in the possession, order, or disposition of a bankrupt, &c., within the 12 & 13 Vic. c. 106, s. 125 (which enacts that, "if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sole alteration or disposition as owner, the court [the commissioner] shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy") two things are required—first, they must be in his possession under such circumstances as to render him reputed owner of the goods; secondly, they must have been left in his possession through some impropriety or laches of the true owner, under circumstances calculated to enable the bankrupt to obtain a false credit by inducing the world to look on him as the true owner (in accordance with the judgment of Lord Redesdale in *Joy v. Campbell*, 1 Sch. and Lef. 326). The question whether goods are in the possession, order, and disposition of a bankrupt may depend on the usage of some particular trade, which may vary at different times and places. When property is left

by parties for other purposes than for sale (as clocks with a clockmaker), the proprietor of the shop is not a reputed owner of them within that statute. (*Hamilton v. Bell*, 18 Jur. 1109). See also 1 Chron. pp. 63, 76, 132, 384, 441, 458; 2 *Id.* 58.

CRIMINAL LAW (*ante*, p. 190).

I. Queen's Bench—Felonies and Misdemeanors.—The Court of Queen's Bench has, on what is termed the crown side, jurisdiction over felonies and over all misdemeanors of a public nature, tending either to a breach of the peace or the oppression of the subject (4 Black. Com. 312; *Com. Dig.* tit. "Courts," B.; 4 Steph. Com. 355, 2nd edit.)

II. Jurisdiction of Quarter Sessions.—The quarter sessions had jurisdiction to try all felonies and all misdemeanors, except perjury and forgery, at the common law; but in capital felonies it was not usual to proceed at the sessions. And now, by the 5 & 6 Vic. c. 38, s. 31, after the passing of the act (30th June, 1842), neither the justices of the peace acting in and for any county, riding, &c., nor the recorder of any borough, shall at any session of the peace, or at any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony, which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life, or for any of the following offences:—1. Misprision of treason. 2. Offences against the Queen's title, &c., or against either House of Parliament. 3. Offences subject to the penalties of præmunire. 4. Blasphemy, and offences against religion. 5. Administering or taking unlawful oaths. 6. Perjury, or subornation of perjury. 7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor. 8. Forgery. 9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern. 10. Bigamy, and offences against the laws relating to marriage. 11. Abductions of women and girls. 12. Endeavouring to conceal the birth of a child. 13. Offences against any provision of the laws relating to bankrupts and insolvents. 14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels. 15. Bribery. 16. Unlawful combinations and conspiracies, except such over which such justice or recorder respectively have or has jurisdiction to try, when committed by one person. 17. Stealing, or fraudulently taking, or injuring, or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein. 18. Stealing, or fraudulently concealing or destroying, any wills

or testamentary papers, or any document or written instrument being, or containing, evidence of the title to any real estate, or any interest in lands, &c. Some other statutes also provide that the offences to which they relate shall not be tried at the sessions (see 4 & 5 Vic. c. 56; and 10 Vic. c. 25). The restraint as to sessions within the jurisdiction of the General Criminal Court is taken away by the 14 & 15 Vic. c. 55 (3 Law Stud. Mag. N. S. p.).

III. *Felony*.—Sir W. Blackstone (4 Black. Com. 95) defines felony to be an offence which occasions a total forfeiture of either land or goods, or both, at the common law, and to which capital or other punishments may be superadded, according to the degree of guilt. The punishment was usually, though not necessarily, capital—Blackstone, therefore, derives the word felony from the Saxon *feo*, or *feoh*, fee, or feud, and the German *lon*, price, as being a crime punishable with the loss of the feud, or benefice. But, as formerly, in petit larceny, the lands were not liable to escheat, and petit larceny was always (before the 7 & 8 Geo. 4, c. 29, s. 2) ranked among felonies, Wooddeson seems inclined to derive it from *faelen*. The term felony is now usually applied to all offences ranging between treason and misdemeanor, whether capital, or punishable with transportation, fine and whipping, or imprisonment at the discretion of the court; though in strictness it also includes treason.

IV. *Highest crime*.—The highest crime that any person can commit is treason (4 Bac. Abr. tit. "Treason"; 4 Steph. Com. 210, 2nd edit.).

V. *Homicide*.—Homicide is the general term for any manner of killing a human being. Homicide is either justifiable, excusable, or felonious. Justifiable is where death arises in preventing the commission of any forcible and atrocious crime, or where an officer kills an offender in the execution of his office, or of process, when resisted. Homicide is excusable where done in necessary self-defence, or where the death is caused by a lawful act without negligence. Felonious homicide includes murder (also self-murder), and manslaughter. Both these killings are unlawful, but murder is done with malice prepenze, whilst manslaughter is without malice (First Book, 384—387; 4 Steph. Com. c. 4, p. 120—154, 2nd edit.; 2 Law Stud. Mag. 334).

VI. *Murder and manslaughter distinguished*.—Manslaughter is the unlawful killing of another without express or implied malice, whereas murder is such a killing with malice, either express or implied (4 Black. Com. 176—200).

VII. *Burglary—Necessary proofs*.—In order to constitute the offence of burglary, there must be proved, 1st, that the offence was committed in the *night time*, that is, by 7 Will. 4, and 1 Vic. c. 86,

s. 4, after nine of the clock in the evening and before six of the clock in the morning; 2ndly, the crime must be committed in a mansion or dwelling house, or in a building communicating therewith. For by 7 & 8 Geo. 4, c. 29, s. 13, no building, although within the same curtilage with the dwelling house, shall be deemed part thereof for the purpose of burglary, unless there shall be a communication with such building and dwelling house, either immediate or by means of a covered and enclosed passage leading from one to the other; 3rdly, there must, in order to make it burglary, be both a breaking and an entry to complete it, or a breaking out after an entry to commit felony, or being therein and committing a felony (7 & 8 Geo. 4, c. 29, s. 11); 4thly, the breaking and entry must be with a felonious intent (4 Black. Com. 224, *et seq.*; 4 Steph. Com. 172—178; 3 Law Stud. Mag. N. S. 183).

VIII. *Burglary—Night time*.—As already stated in the preceding answer, a burglary must be committed between nine in the evening and six in the morning of the following day (7 Will. 4, and 1 Vic. c. 86, s. 4; 4 Steph. Com. 172, 173, 2nd edit.). It has been held sufficient in an indictment for burglary to allege that the offence was committed "burglariously" without stating the time at which the offence was committed or even that it was done in the night-time (Reg. v. Thompson, 2 Cox's Crim. Cas. 443).

IX. *Forgery*.—Forgery is the fraudulent making or alteration of a writing to the prejudice of another man's right, with a view to put it off as a genuine document, so as to defraud some one (Reg. v. Marcut, 2 Car. and Kirw. 356); but by s. 8 of the 14 & 15 Vic. c. 100, the intent to defraud particular persons need not be alleged or proved. It was a misdemeanor at common law, and was punishable with fine and imprisonment only; but now by statute it is in many cases felony (Clark v. Newsam, 1 Exch. Rep. 181), and punishable with transportation or imprisonment (4 Steph. Com. 205, *et seq.* 2nd edit.). The uttering of a forged instrument, the forgery of which is only a forgery at common law, is no offence, unless some fraud was actually perpetrated by it (Reg. v. Boulton, 2 Car. and Kirw. 356).

X. *Forgery—Punishment—Death*.—Forgery is now in no case punishable with death, the 11 Geo. 4, and 1 Will. 4, c. 60, having repealed all the statutes making the offence of forgery capital. Forgery is now punishable by transportation for various periods of time, extending in some instances to the party's life, or with imprisonment, with or without fine (4 Stewart's Com. 291, *et seq.*; 4 Steph. Com. 180, 181, 1st edit.; First Book).

XI. *Larceny*.—Larceny at the common law is the

unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same, and not being committed under the circumstances requisite to make it burglary (4 Steph. Com. 152, 153, 1st edit.; 1 Law Stud. Mag. N. S. Supp. p. 51). Larceny, or theft, is distinguished by the law into two sorts; the one called *simple larceny*, or plain theft unaccompanied by any other atrocious circumstance: and *mixed or compound larceny*, which also includes in it the aggravation of a taking from one's person or house. Simple larceny is defined to be the felonious taking and carrying away of the personal goods of another (1 Cr. Law Rep Dig. L. of theft). Formerly a stealing of goods above the value of twelve pence, was denominated grand larceny; if of, or under that value, petty larceny; but this distinction is abolished by 7 & 8 Geo. 4, c. 29, s. 2 (4 Stewart's Com. c. 7, First Book, 394).

XII. *Stealing title deeds*.—At the common law larceny could not be committed of things real, or savouring of realty, but an action of trespass was the proper remedy. And as title deeds concerned, or savoured of the realty, it was not larceny to take them. But by 7 & 8 Geo. 4, c. 29, s. 23, stealing writings relating to real estates is a misdemeanour, punishable with transportation for seven years, or fine and imprisonment, but these provisions are not (by s. 24) to lessen any remedy which the party aggrieved had before, provided that the conviction of such an offender shall not be received in evidence in an action or suit against him (see Carring. Cr. Law, 296, *et seq.*; 6 Law Stud. Mag. 251).

XIII. *Embezzlement*.—Embezzlement is where one in a public trust, or as a servant, receives and fraudulently appropriates money or goods received for public purposes or for his master, without the same having been in the possession of the party entitled thereto (Dickenson's Quart. Sess. 261, 355, 5th edit.).

XIV. *Perjury and punishment*.—Perjury is the crime of false swearing which arises when a lawful oath is administered in some judicial proceeding, to a person who swears wilfully, absolutely, or falsely, in a matter material to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath; or before some magistrate, or proper officer, or person, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution (4 Bl. Com. 187). The 14 & 15 Vic. c. 99, s. 16, authorises every court, judge, justice, officer, commissioner, arbitrator, or other person, having by law or by consent of parties authority to hear, receive, and examine evidence, to administer an oath to all such witnesses as are legally called before them respectively. Perjury is punish-

able at common law with fine and imprisonment to hard labour (3 Geo. 4, c. 114), at the discretion of the court, and by stat. 2 Geo. 2, c. 25, s. 2, the judge may order the party to be transported, or to be imprisoned and kept to hard labour in the house of correction for any term not exceeding seven years. By the 3 Geo. 4, c. 114, the offender may be sentenced to imprisonment with hard labour for any term for which he may be lawfully imprisoned, either in addition to or in lieu of any other punishment.

XV. *Common nuisance—Prosecution for*.—Common nuisances are such as affect or annoy the whole community in general, and not merely or solely some particular individual; of this nature are annoyances in highways, rivers, and bridges; all kinds of offensive trades and manufactures; disorderly houses, &c. This class of nuisances is remediable by indictment only, and not by action, the reason being that it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damages him only in common with the rest of his fellow subjects (4 Bl. Com. 167). An action may, indeed, be maintained by an individual who can prove that he has sustained some *particular damage* beyond what is suffered by other subjects (Co. Litt. 56; 12 Mod. Rep. 262; 2 Stark. Evid. 536; Princ. Com. Law, pp. 2, 191).

LEGAL EDUCATION—INNS OF COURT—THE BAR.

One of the most interesting, if not the most important, of the reports lately issued by the now-fashionable plan of commissions is that just issued by the commissioners for Inquiring into the Revenues of the Inns of Court and their application to the Promotion of the Study of the Law. The feeling is daily growing that candidates for the bar should do something more than eat their way there, and this has been not a little induced by the evident good effects resulting from the institution of an Examination of Articled Clerks. The report is not very long, but still we do not propose to burthen our pages with the whole of it, but we purpose to give such extracts as may be likely to be acceptable to our readers.

Revenues and expenditure of the Inns of Court.—The commissioners state, that from the accounts supplied and the explanations furnished by the Treasurers and Sub-Treasurers of the several Inns of Court, they have made a comparative statement of the income and expenditure of the four Inns, and compared it with the average of the last three years. Without going into the details, we shall give the total receipts and payments of each Inn in

one sum. The rents of chambers and receipts from members amount to the following sums in the several Inns:—Inner Temple, £21,168 16s.; Middle Temple, £10,192 10s. 7d.; Lincoln's Inn, £18,242 12s. 8d.; Gray's Inn, £8,343 4s. 8d.: Total, £57,947 8s. 6d. The outgoings are as follows:—Inner Temple, £15,945 0s. 10d.; Middle Temple, £10,191 13s. 9d.; Lincoln's Inn, £13,845 8s. 2d.; Gray's Inn, £8,717 9s. 8.: Total, £49,199 12s. The commissioners remark on these receipts and payments in the following terms:—"The apparently large amounts of rents received by Lincoln's Inn and the Inner Temple, and of rents and dividends received by the Middle Temple, might lead to the formation of an exaggerated estimate of the resources derivable from the property of these bodies. The necessary outgoings, however, incidental to property of this peculiar character are very large, and leave but a limited nett income to the Inns of Court. In the case of Lincoln's Inn, although the rents and incidental receipts from their property have for the last year, 1854, amounted to the sum of £18,242 12s. 8d., yet it must be borne in mind that the Inn is encumbered with a debt amounting at present to £40,000, incurred in respect of erecting a new Hall and Library. If we deduct also the expenditure for repairs, insurance, rates, taxes, watching, lighting, the Hall, the salaries of the establishment (exclusive of the Chapel and Library), and the interest of the debt, the remainder of the income of their property only amounted to £4,548 19s. 5d., whilst the expenses of the Chapel and Library amounted to £651 15s. 4d. This Inn provides courts for the Lord Chancellor and the three Vice-Chancellors gratuitously, and a court for the Lords Justices at a small rent. The sittings of these courts at Lincoln's Inn, no doubt, adds considerably to the value of the property there. In like manner, in the case of the Middle Temple, although the rents and dividends, &c., amounted to £10,192 10s. 7d., yet the outgoings for repairs, insurance, rates, taxes, &c., and establishment, came to £8,982 6s., leaving a remainder of £1,259 2s. 9d.; which is expended on the Chapel and Library. Moreover, a very heavy demand will shortly arise, in consequence of the great age and consequent dilapidation of many portions of their buildings. The Inner Temple is less unfavourably circumstanced. The large rental of £15,227 0s. 8d., with the payments from members amounting to £5,941 15s. 9d., after deducting for repairs, and for rates, taxes, watching, lighting, establishment and for annuities chargeable on the property, leaves still a surplus of £6,934 8s. 5d., and the Chapel and Library expenses do not amount to £1,800; nevertheless the repairs are annually very heavy, the

Society has only recently paid off a large building debt, and ere long a considerably outlay will be again required for rebuilding part of the property. The property of Gray's Inn is far less than that of the other Inns of Court; and it is not probable that any considerable amount of surplus income can be derived from that source beyond their present contribution to the funds provided for the readers as after mentioned in our report. The actual surplus of income and expenditure of Lincoln's Inn and the Temples for the year 1854, is as follows:—Inner Temple, 1854, £5,223 15s. 2d.; Middle Temple, 1854, £1 1s. 10d.; Lincoln's Inn, 1854, £3,897 4s. 1d.; Gray's Inn, in 1854, the expenditure exceeded the income by the sum of £374 4s. 7d. With respect to Lincoln's Inn, that surplus is applied in the first instance to payment of annual instalments of £1,500 of their debt, and will continually increase until that debt is paid off. Moreover, the falling-in of the leases of Stone Buildings, which will eventually take place, will be an important addition to the revenues of that society. On the other hand, the condition of the old buildings indicates the probability and necessity of a considerable outlay becoming necessary for repairs from time to time, which may occasionally exceed the amount above stated for last year. Upon the whole, we are under no apprehension as to any serious falling-off in the surplus Income of Lincoln's Inn and the Inner Temple. With respect to the Middle Temple, we have already adverted to the possibility of large outgoings being necessary for repairing the older buildings of that Inn; and there is, therefore, little probability of a surplus arising in respect of the annual resources of that Society. As regards Gray's Inn, we do not think it probable that any considerable surplus Income can be anticipated. We deem it unnecessary to pursue this subject further, for if in consequence of any falling-off in the Income to the Inns of Court they should find themselves unable to contribute to Legal Education more than their present limited contributions, the requisite resources for carrying into effect the plan of education suggested in the subsequent part of our report, might be obtained by a moderate additional fee on the Students, which, as directly applicable to the promotion of their education, could not be objected to."

English and Foreign systems of legal education.—

The commissioners point out the present method of conducting legal education in England, and then refer to the systems pursued in Scotland, the principal states of Europe, and in the United States.

1. *English Studentship.*—All that is at present required of a person wishing to become a student of the law in England, with the view of being

ultimately called to the bar, is, that he become a member of one of the four Inns of Court, which is effected by making a formal application for that purpose, merely stating to the authorities of such Inn who and what he is, with a certificate of his respectability, signed by two barristers, attached to it; that he keep twelve terms, by dining a certain number of times in the hall; and that he attend during one year the lectures of two of the readers appointed by the Council of Legal Education, or, at his option, submit to a public examination, which is compulsory only upon those who do not attend the lectures. The details of these arrangements we have given in a subsequent part of our report.

2. *Scotch Studentship*.—In Scotland, by the existing regulations, three qualifications are at present indispensable to the admission of "infrants," or students, into the faculty of law. It is required of every candidate that he give evidence of general scholarship; that he pass two examinations upon the civil and the Scotch laws; and, lastly, that he prepare a Latin thesis upon a title of the Pandects. This system, however, being deemed insufficient, the Faculty of Advocates at Edinburgh have lately made a report upon the subject, recommending a much more strict and comprehensive course of legal study, with examinations both in general knowledge and in law.

3. *French Studentship*.—In France the student must first obtain the diploma of "Bachelier-ès-Lettres" at certain public schools, and then he presents himself at the Ecole de Droit, is inscribed as a pupil, and follows the courses of different professors for three years, attending lectures on the Roman law, on the Code Napoléon, on the study of law generally, on criminal legislation, on civil and criminal procedure, on criminal law and penal legislation, on administrative law, on the rights of nations, and on the history of Roman and of French law, with conferences on the Pandects. He has further to write theses on the civil law, the Roman law, criminal and commercial law; and having passed all the examinations on these several subjects, at the end of the third year he receives the diploma of "Licencié en Droit," and is entitled to be sworn before the court, and thereupon he becomes an avocat. A fourth year's continuance, however, at the Ecole de Droit, attendance at lectures, submission to examinations, and the composition of a thesis, are requisite to obtain the degree of doctor of laws, which is necessary for those who are desirous of becoming professors in the faculties.

4. *German Studentship*.—Throughout Germany every appointment in the law, from that of notary public to the judicial bench, is in the hands of the Government, under the patronage of the Minister of

Public Justice; and the training necessary to qualify the candidates for such offices is strictly the subject of Government regulation. That training begins at some gymnasium or state school, where the youth intended for the law are instructed in classical and general literature; and here they acquire all the knowledge of these branches of education they are ever likely to obtain. From the gymnasium or high school the young student of law is transferred to some university by certificate of competent attainment in those preliminary studies. At the university his preparation for the profession of the law may be properly said to begin. These studies consume three years of his time, and comprise attendance upon lectures on general law (*Encyclopædia of Law*), the Institutes of Justinian, the Pandects, the common law of Germany, feudal law, history of law, and criminal law. At the close of his university career he presents himself to the judges of some one of the courts of law, bringing with him testimonials of due attendance upon lectures and good moral conduct, and applies for examination as an auscultator, or hearer of law. If upon such examination his attainments in the subjects of university study prove sufficient, he is admitted, as auscultator, to the practical study of the law under the judges of the court. In this capacity he takes notes, makes abstracts of proceedings, draws up reports, and acts in many respects as clerk or assistant to the judges. After spending two years, or even more, in this capacity, but without official function or pay, he applies to be examined for his advancement to the higher preparatory station, namely, that of *referendarius*. If found competent, he enters upon a more direct participation in the business of the court, though as yet under the strict superintendence of the judges, and still without recognised function or pay. At this stage, however, he is competent to take upon him the duties of a notary or advocate; but if he aspires to the judicial dignity he has to undergo a third and last examination of a much more general and searching nature, touching upon all the subjects of previous study, and testing his power of applying them in practice. If he succeed in satisfying the examiners—no easy task—he is named assessor to some court of the first instance, yet still without pay or emolument, until the Minister of Justice shall find an opportunity of transferring him to the bench. All these studies usually occupy seven or eight years of the student's life; and it is not till he has passed through these successive trials, and is fortunate enough to find a vacant place at the bar or on the bench, that he enters upon the profitable exercise of the profession.

5. *Two Sicilies*.—In the kingdom of the Two Sicilies, any one intended for the profession of the

law, after passing his examination in belles-lettres, must undergo a course of examinations before a board of the professors of law in one of the universities of the kingdom. These examinations are in the following subjects:—1. *Jus naturæ* and gentium; 2. Civil law; 3. Neapolitan civil law; 4. Neapolitan criminal law; 5. Commercial law. The examination in canon law is optional. The student, having passed these several examinations in a satisfactory manner, obtains a diploma called the *Laurea*, which enables him to practice in all the courts of the kingdom. This preparatory course takes from four to five years.

6. *United States*.—In the United States of America, where seemingly the greatest latitude exists as to admission to the bar, though generally speaking no attendance at schools, colleges, or lectures, nor any particular course of study, is absolutely required, yet an examination as to professional knowledge must be submitted to before a person is allowed to practise.

Preliminary examination of articled clerks.—Though not immediately within the actual scope of the commissioners inquiry they refer to what will certainly interest articled clerks, viz., that a preliminary examination should take place:—"Your commissioners would here add, that with regard to the education of the articled clerks—young men preparing themselves for the professions of solicitors and attorneys-at-law—the gentlemen who have been questioned on this subject are uniformly of opinion that they should be obliged to undergo an examination as to capability, fitness, and general knowledge, before being apprenticed or articled.

Calls to bar without any examination.—In reference to the present system of getting called to the bar without any examination or other test of proficiency, the commissioners observe that until the recent appointment of the Council of Legal Education there was no preliminary test whatever of the intellectual capacity or attainments of a barrister; any person (provided he were not guilty of impropriety of conduct, and complied with some special provisions) might, by simply making certain payments, and dining a certain number of terms in the hall of one of the four inns of court, become a barrister. The Inner Temple alone, for a short period, had required a preliminary classical examination before a student was admitted to the inn. This system was considered by the inn to be highly beneficial, but was discontinued after a few years, by reason of the same course not having been adopted by the other societies. At present the system pursued is as follows:—There is no preliminary examination for the admission of students. The four inns of court have provided five readers, who receive a salary of three hundred

guineas each. Each inn pays the salary of one reader, and contributes to the expenses of the fifth or remaining reader. The students pay a fee of five guineas on admission to an inn, which entitles them to attend the lectures of all the readers. These readers deliver lectures in constitutional law and legal history, civil law and jurisprudence, common law, equity, and the law of real property, and hold also evening classes for those who are willing to attend them. The students pay an additional fee, not exceeding three guineas in the whole, for being admitted to these classes. No student can be called to the bar unless he have attended during one whole year the lectures of two readers at least, or have submitted himself to public examination; but here all efforts to enforce the acquirement of information ceases. In order, however, to encourage a course of study, a voluntary examination has been instituted, which takes place three times a year; and a studentship of fifty guineas a year, to be held for three years, has been founded by the inns of court, which is conferred on the most distinguished student at each examination. Three other students may be selected by the Council of Legal Education as having passed the next best examination, and to these a certificate is given, which exempts them from keeping two terms prior to their call. Certificates of having satisfactorily passed the examination are also conferred on such other students as the Council consider entitled to receive them; and persons desirous of being relieved from attendance at lectures have the option of passing this voluntary examination as an alternative. It will be obvious that no test whatever of the acquirements of those who are to be called to the bar has been provided by this system, except in the case of those who voluntarily submit themselves to examination, and who are probably those with regard to whom a test is least required. The attendance on lectures affords the opportunity of acquiring information, but not a test of its acquisition. Further than this, we may remark, that the voluntary examination is confined to the subjects on which the readers deliver lectures; and although no student thoroughly destitute of learning could successfully pass the examination, yet it appears by the evidence that candidates, who have been on the whole sufficiently well informed in purely professional matters to pass the examination, have yet displayed gross ignorance in a subject so nearly connected with it as the legal history of their country.

Test of general and professional knowledge.—The commissioners have arrived at the conclusion that there should be a test both of general and professional knowledge, for every candidate for the bar. They add that "in arriving at this conclusion with respect to the necessity of a test we desire to be understood

as not disparaging or undervaluing the present system of practical study in a barrister's chambers, which must be admitted to be very efficient in fitting the student for the active duties of his profession; it affords, however, no facilities for the study of the scientific branches of legal knowledge, including under that term constitutional law and legal history, and civil law and jurisprudence. Some knowledge of these subjects must be useful to the barrister, not only as an advocate, but as a judge, and especially if he should be appointed to any judicial office in India or in the colonies; and although, during the ordinary period of preparation for the bar, it would probably be found impracticable to obtain an entire acquaintance with them without sacrificing objects more immediately pressing, yet there would be time enough to lay the foundation of this knowledge, which might be completed after the student should have been called to the bar, and before his time became wholly absorbed by practice. By mastering principles, the student becomes more interested in, and obtains a steadier grasp of, practical details. The most convenient method of acquiring knowledge of these subjects is by lectures, followed by examination applicable both to the lectures and to the subjects generally. With respect to the practical branches of the law—that is to say, common law, equity, and conveyancing—although the knowledge of them will for the most part be best acquired in the chambers of the barrister or conveyancer, yet lectures on the principles of these subjects, combined with private study, afford important assistance to the student, and the prospect of an examination in them would be an useful stimulus to pupils studying in chambers—a stimulus the more necessary when we have regard to the length of time which elapses between the commencement of study and professional practice. Moreover, the barrister or conveyancer having pupils would feel that he had an interest in their success at the examinations, and would be desirous, even more than at present, of giving systematic instruction in the law, considered as a science. It cannot be doubted that if a pupil, before going as such to the chambers of a barrister, should study under a reader the principles of the branch of law to which he is about to address himself, he would derive far more advantage from his period of pupillage than if he went there without such previous preparation. Such instruction under a reader would not necessarily disturb the present system of pupillage in chambers, if the lectures should be given at convenient times, and if the examination should be so regulated as to enable, not only those who attend lectures, but those who diligently attend chambers, to pass, and to obtain distinctions and prizes. With

this view, the question at examinations might be so framed as on the one hand to test the knowledge which has been derived by those students who have attended the lectures, and on the other hand to test the knowledge of the subject which has been acquired in any other manner."

Legal University.—The commissioners propose that the four Inns of Court shall be united in one university for the purpose of the examinations which they recommend to be instituted, and also for the purpose of conferring degrees. The following are the only propositions on this subject which we think it worth while to notice:—1. That a university be constituted, with a power of conferring degrees in law, of which the constituent members shall be "the chancellor, barristers-at-law, and masters of laws." 2. The chancellor of the university to be elected for life, the electors being all barristers (including serjeants) and masters of laws. 3. That a senate, consisting of thirty-two members, shall be elected in manner following, viz., eight members shall be elected by each Inn of Court, five of them being benchers of the Inn, and elected by the benchers, and three of them being barristers (including serjeants) of any Inn, but elected by the barristers (exclusive of the benchers) of the Inn to which they belong.

Two examinations of students for the bar.—The commissioners also propose that there shall be 1. a preliminary examination for admission to the Inns of Court of persons who have not taken a university degree; 2. that there shall be an examination before a call to the bar is made, and also before taking a degree of masters of laws, for the novelty of a degree in law is recommended by the commissioners.

Preliminary examination.—To pass the preliminary examination, candidates must possess a competent knowledge of English history and Latin.

Examinations for a call and for a degree.—The subjects for the examination of students desirous of being called to the bar, or of taking a degree in laws, shall be divided into two branches, consisting of the following subjects:—First branch: a, Constitutional Law and Legal History; b, Jurisprudence; c, The Roman Civil Law; Second branch: a, Common Law; b, Equity; c, The Law of Real Property. That no person shall be called to the bar unless he shall receive a certificate from the senate of having passed a satisfactory examination in at least one subject in each of the above branches. That students may present themselves as candidates for honours at the examination in such branches; and if they shall be deemed by the examiners to have passed a creditable examination in all the subjects of either branch, they shall be entitled to a certificate of

honour in respect of such examination; and if they shall have passed a like examination in all the subjects of both branches, they shall be entitled to the degree of master of laws. The senate to make regulations in respect of the classification of the students for honours. That at each examination a studentship of fifty guineas per annum, to be held for four years, be awarded to the master in laws who shall have passed the best examination.

Altogether the report is a very excellent one, and the suggestions and recommendations of the commissioners, if carried into effect, will form an era in the history of the profession. Our readers have more interest in the subject than they may at first suppose, for there can be no doubt that the system will react on the examination for articulated clerks, and induce a stricter examination, and most certainly it will hasten the adoption of a preliminary examination. We give the conclusion of the report containing some very good remarks upon the subject of a previous education applicable to articulated clerks as much as students for the bar:—"We would venture to suggest, in conclusion, that the several universities of the realm will, in our judgment, co-operate more effectually in advancing legal education by a sound and liberal training for the students intending afterwards to enter upon the profession of the law—a training limited, in respect to that study, to general principles—than by increasing the amount of special instruction which the Inns of Court should properly supply. We feel assured that there is no more important part of the solid preparation for entering upon any of the learned professions than the discipline and the cultivation of an enlightened university education; and looking to the increased facility of such preparation, and the probable effect of the improved system in the Inns of Court, which we humbly recommend for their adoption, we anticipate with hope and confidence the maintenance of an educated and enlightened bar, upon whose integrity, independence, and learning the pure administration of justice, and the security of civil society, must, under the blessing of Divine Providence, largely and permanently depend."

SPECIAL JURIES.

ANOTHER case of a somewhat similar nature to that mentioned *ante*, p. 212, occurred subsequently, in which the Chief Justice of the Common Pleas was rather facetious on Lord Campbell's "cheap expression of regret." The following are the circumstances as given in the newspapers:—Shortly before the sitting of the Court of Common Pleas the crier announced that one of the special jury causes in the

list had been withdrawn, and the jurymen summoned in it would not be wanted. A special jurymen addressed his lordship on his taking his seat, and said that he had been summoned in a special jury case, which he had learned at the last moment had been withdrawn; he had come six miles on purpose to obey his summons, and had been put to expense in so doing; and he wished to ask his lordship whether he was not entitled to previous notice of withdrawal, or to some compensation for the expense to which he had been put. The Chief Justice—You ought certainly to have been informed that the case was withdrawn. The special jurymen—I have been here in this court for the last half hour, and I have had no notice until the last moment. The Chief Justice—It is true that notice should have been given by the parties. The special jurymen—May I take the freedom of mentioning that the Chief Justice in the Queen's Bench expressed an opinion yesterday that in such cases jurors should be compensated? The Chief Justice—And pray did my Lord Chief Justice inform the jurors how compensation was to be obtained? I agree with my Lord Chief Justice in giving the cheap expression of his regret that no notice has been given, but I can give you no remedy, as he very well knows. The matter so ended, and the business of the court proceeded.

BILLS OF EXCHANGE SUMMARY PROCEDURE ACT.

(*ante*, p. 197, 199, 202).

NEW RULE OF COURT.

The difficulty before referred to as to the indorsement of costs has been got rid of, though by a very recent decision of the courts, a construction was put on the act, and the forms there given which rendered the rule unnecessary on the main point, but, of course, the rule will require the attention of the practitioner. The following is the rule referred to:—

"The indorsement on writs under this act may be in the following form:—

"This writ was issued by E. F., of &c., attorney for the plaintiff; or by A. B., who resides [mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence].

"The plaintiff claims pounds, principal and interest [or pounds, balance of principal and interest], due to him as the payee [or indorsee] of a bill of exchange [or promissory note], of which the following is a copy:—

[Here copy bill of exchange or promissory note, and all indorsements upon it].

And also shillings for noting [if noting has been

paid], and £ for costs: and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof all further proceedings will be stayed.

"NOTICE.

"Take notice that if the defendant do not obtain leave from one of the judges of the courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, and the sum of £ for costs, and issue execution for the same.

"Leave to appear may be obtained on an application at the Judge's Chambers, Serjeants'-inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

"Indorsement to be made on the writ after service thereof:—

"This writ was served by X. Y. on L. M. (the defendant), on Monday, the day of , 185 by X. Y.

"Nov. 26th.

By the judges.

"N.B.—No other claim than a claim on a bill of exchange or promissory note is to be included in writs issued under the Summary Procedure on Bills of Exchange Act 1855."

SUMMARY OF DECISIONS.

EQUITY PRACTICE.

COSTS.—*Discretionary power of taxing master under orders May, 1845—Charge for drawing abstracts of documents as instructions for counsel to prepare answer—Fees to two counsel to settle consultations—Proper charge for abbreviating answer.*—The 120th order of May, 1845 giving the taxing master power to allow to the parties all such just and reasonable expenses as should appear to be incurred in advising with counsel on the pleadings, and procuring counsel to settle pleadings, and supplying counsel with copies of or extracts from necessary documents, provided that the master should not allow any costs which should not appear to have been necessary or proper for the attainment of justice or for defending his rights, or which should appear to have been incurred through over caution, or merely at the desire of the party. The Master of the Rolls has decided that the master has no discretionary power under the above 120th order

to allow a charge for drawing abstract as instructions to counsel to settle answer, nor to allow fees to two junior counsel to settle answer, or any charges incident thereto. The proper charge for abbreviating an answer is by estimating it at its total length exclusive of schedules. The taxing master, in a taxation between party and party may increase any charges made in the bill of costs. *Davis v. Earl Dysart*, Week Rep. 55-6, p. 41; 26 Law Tim. Rep. 84.

EVIDENCE.—*Cross examination in country—Chancery Amendment Act s. 28—Appointment of examiners—Witnesses who have made affidavits may be cross-examined orally.*—Where witnesses had sworn their affidavits in London, although resident at Liverpool and Sunderland, yet examiners were appointed to cross-examine them at those places upon their evidence that it would put them to great personal inconvenience to attend at the examiners office. *Ogilvy v. Gregory*, Week. Rep. 55-6, p. 67; 26 Law Tim. Rep. 58.

EVIDENCE.—*Deposition taken de bene esse in prior dismissed suit—Publication—Witness abroad.*—It is now the policy of the courts of equity to admit the testimony of many persons whose evidence under the old course of the court, would have been entirely excluded. The present system of evidence is founded upon admitting at the latest moment, even at the hearing of the cause, as evidence *de bene esse* or otherwise, anything brought forward legitimately as between the plaintiff and the defendant. Where the evidence of a witness about to go abroad had been taken *de bene esse* on an order obtained *ex parte* at the instance of the plaintiff in a former suit, which suit had been dismissed through the conduct of the plaintiff himself; leave was given to the same plaintiff to read the deposition in a subsequent suit instituted between virtually the same parties, and for substantially the same purpose as the former, the witness being still abroad and having been unheard of for some time previously. *McIntosh v. The Great Western Railway Company*, 1 Jur. N. S. 1182; 26 Law Tim. Rep. p. 102.

INJUNCTION.—*Notice of motion for before bill filed.*—The court will give leave to serve notice of motion before bill filed on the undertaking that the bill shall be on file when service is effected. *Maynard v. Fraser*, 26 Law Tim. Rep. 88.

PARTIES TO SUIT.—*No personal representatives—15 & 16 Vic. c. 16, s. 44.*—We have seen (vol. 1, p. 60) that by 15 & 16 Vic. c. 16, s. 44, a court of equity may proceed in a suit without the representative of a deceased person, or may appoint some person to represent the estate. In a case which came before V. C. Kindersley that judge seems to have thought, though he was not necessarily compelled to

decide the point, that where a bill is filed for an account of the assets of a testator, and for no other purpose, and there is no representative of the testator before the court, the court has no jurisdiction under the above 44th section to appoint a person to represent the estate. Such a simple case as that is not likely to arise, for this reason, that the 44th section applies only to an existing suit. Now, if there be a creditor or legatee wishing for an account of the estates of a testator where there is no legal personal representative, where the executor will not prove, where there has been no administration with the will annexed, and no administrator *ad litem*, there would be no suit at all, for there could be no suit at all or without a defendant, and the 44th section only applies to suits already existing. Now, so far, that view of Kindersley, V. C., is borne out by the words of the statute, which certainly contemplate an existing suit, and a person interested in the suit; what was referred to and decided by Kindersley, V. C., was that the legal personal representative of a legatee was not a proper person to be treated as a person entitled as a plaintiff to a general account of assets. In a case before V. C. Stuart this subject was considered. It was a suit for payment of a sum of money, and for an account against three defendants, one of whom was primarily, and the others only secondarily, liable; the former defendant died, leaving a will, but the executors refused to prove. An application under the above clause on behalf of the plaintiff, which was resisted by the surviving defendants, that the suit might proceed without a representative of the deceased defendant, refused under the above circumstances, the court having power under the above section to appoint some person to represent the estate for the purpose of the suit; the executors who refused to act appearing to the court to be fit persons, were appointed accordingly *Ashmall v. Wood*, 1 Jur. N. S. 1180; 26 Law Tim. Rep. 86; Week. Rep. 55-56, p. 60.

COMMON LAW.

INFANT CHILD.—*Custody of infant—Husband and wife—Father's right to custody of young child.*—In the case of *Rex v. Manneville* (5 East, 221), the Court of Queen's Bench recognized the right of a father to the custody of his child, although it was then an infant at its mother's breast (see also *re Hakewell*, 12 Com. Ben. Rep.; 2 & 3 Vic. c. 54; Key div. "Equity," p. 48; *re Pulbrook*, 11 Jur. 1039). In accordance with the above decisions, the Court of Exchequer has held that the father is entitled in law to the custody of his child, though an infant under seven years, and the court will in its discretion order such child to be delivered to the custody of its father, if the court see no ground to

impute any motive to the father injurious to the health or liberty of such a child. *Ex parte Young*, 26 Law Tim. Rep. 92; Week. Rep. 55-6, p. 127.

COMMON LAW PRACTICE.

ATTORNEY.—*Costs—Taxation—Jurisdiction of judge.*—Whether or not a bill is taxable is a question for the judge to whom application for the order to tax is made. Where, therefore, such an order was made, and execution issued thereon, *Crompton, J.*, refused to set it aside, though it was alleged that the bill contained no taxable item. *Re Johnson*, 26 Law Tim. Rep. 108; Week. Rep. 1855-6, p. 89.

COSTS.—*Remanet—Abortive trial—Verdict entered for party moving.*—The rule is that remanets are costs in the cause.—The costs of an abortive trial are not allowed. A cause was made a remanet from the sitting after Trinity Term to the sitting after Michaelmas Term when it was tried, but the jury not agreeing, they were discharged by the judge. The cause then went down again for trial, when a verdict was returned for the plaintiff with leave to the defendants to move to enter the verdict for themselves. Upon motion accordingly, the court directed the verdict to be entered for the defendant. Upon the taxation of the defendants' costs the master refused to allow them the costs of the cause being made a remanet: Held, that such costs were costs in the cause, and that the defendants were entitled to them. *Dowell v. The General Steam Navigation Company*, Week. Rep. 1855-6, p. 120; 26 Law Tim. Rep. p. 109; Week. Rep. 55-6, p. 127.

EXECUTION.—*Execution by ca. sa. for less than £20—Construction of 7 & 8 Vic. c. 96, s. 37.*—As stated, vol. 1, p. 275, by the 7 & 8 Vic. c. 96, a *ca. sa.* cannot be issued where a debt recovered is less than £20. The Court of Exchequer has decided that where a plaintiff sues on a debt for more than £20, and which before judgment is reduced below that sum by payment he may enter up judgment for the whole sum, and can then issue a *ca. sa.*, which, however, should only be indorsed for the sum really due. *Blew v. Steiman*, 26 Law Tim. Rep. 107.

INTERROGATORIES FOR EXAMINATION OF PLAINTIFF [vol. 1, pp. 160, 312, 345, 381].—*The Common Law Procedure Act, 1854—Foreign Plaintiff.*—It was at one time doubted whether the provisions of the Common Law Procedure Act for the examination of a plaintiff on interrogatories extended to a plaintiff out of the jurisdiction, though the 18 & 19 Vic. c. 42 (*ante*, pp. 61, 62), enabling acting consuls and consular agents to administer oaths, seemed to have removed much of the difficulty supposed to exist. It has been decided by the Bail Court that in an action brought by a foreign plaintiff

resident abroad, the defendant, an English subject resident here, is still at liberty to deliver interrogatories. *Re Young*, 26 Law Tim. Rep. 108.

PAYMENT OF MONEY INTO COURT [*ante* p. 190].—*Costs—Amendment at trial—Defective particulars of Demand—Further sum paid into court.*—The following case will illustrate the statement *ante*, p. 196, as to costs where money is paid into court:—A declaration contained two counts; under the first the plaintiff claimed £500 as liquidated damages; under the second he claimed by his particulars of demand £12 9s. 6d. To the second count the defendant paid £12 9s. 6d. into court, and as to the residue pleaded never indebted, the plaintiff taking the money out of court in part satisfaction. The defendant, at the trial, made out a good defence to the first count, but it appeared that under the second there was a further sum of £1, which the plaintiff had omitted to claim. The judge upon the application of the defendant, gave him leave to amend by payment of the £1 into court, upon payment of costs of the amendment; and the record was accordingly altered, the replication being made to take the money out in full satisfaction:—Held that the plaintiff was only entitled to such costs as he would have had if the entire sum had been originally paid into court and taken out in satisfaction. *Young v. Martin*, Week. Rep. 1855-6, p. 100.

SPECIAL JURY.—6 Geo. 4, c. 50, s. 84—*Certificate for special jury—When to be given after trial.*—The 3 & 4 Vic. c. 24, requires that, to entitle a party to the costs of a special jury, "the judge before whom the cause is tried shall immediately after the verdict certify," &c. That has been construed to mean within a reasonable time (*Christie v. Richardson*, 10 M. and W. 688). The case of *Grave v. Clinch*, 4 Q. B. 606, is directly and immediately in point. There the jury retired to consider their verdict, and while they were absent another cause was called on; and upon their returning with their verdict, the judge was applied to to certify, and he at once granted the application; but in the hurry of business, the judge left the assize town without having signed the certificate, and he did not certify until several weeks afterwards. The court set that certificate aside, on the ground that it had not been granted in time. This has been followed by the Court of Exchequer in the following case:—When a judge is willing to certify that the cause tried before him was a proper case to be tried by a special jury, the certificate should be obtained from him immediately, or at all events before the rising of the court on the same day. *Leach v. Lamb*, Week. Rep. 1855-6, p. 99; 26 Law Tim. Rep. 107.

TRIAL WITHOUT A JURY.—17 & 18 Vic. c. 125, s. 1 [1 Chron. 157].—*Waiver of irregularity*

—*Omission by consent of preliminaries—Verdict against evidence.*—The first section of the C. L. P. A., 1854 (17 & 18 Vic. c. 125), enacts, that "the parties to any cause may, by consent in writing, signed by them or their attorneys as the case may be, leave the decision of any issue of fact to the court, provided, that the court upon a rule to show cause, or a judge on summons shall in their or his discretion think fit to allow such trial" &c. At the assizes, a cause by consent was tried before the judge (the Queen's counsel whose name was in the commission of assize) without a jury pursuant to the above provision in sec. 1 of the 17 & 18 Vic. c. 125 (C. L. P. A., 1854), but there was no consent in writing nor was there any rule drawn up as provided for by that section. Upon an application to this court to set aside the verdict on the ground of such omission:—Held, that as these were merely preliminary matters, and the judge had jurisdiction, the parties were by their consent estopped from taking such an objection: Held also, pursuant to the provision of the act (see 1 Chron. p. 157), that upon a trial before the judge alone, no objection can be taken that the verdict is against evidence. *Andrews v. Elliott*, Week. Rep. 1855-6, p. 8; 26 Law Tim. Rep. p. 57.

BANKRUPTCY AND INSOLVENCY.

BANKRUPT.—*Certificate under 12 & 13 Vic. c. 106—Petition under 1 & 2 Vic. c. 110 whilst in custody on execution after certificate—Concealment of bankruptcy.*—The Bankrupt Law Consolidation Act, 1849, by sec. 257 enacts, that the assignees for the time being of the estate and effects of any bankrupt when the accounts relating to his estate shall have become records of the court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear due from him to his creditors; and every creditor of any bankrupt, immediately after the proof of his debts shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof, and the court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the court, in the form contained in schedule B. to this act annexed, and every such certificate shall have the effect of a judgment entered up in one of her Majesty's superior courts of common law at Westminster, until the allowance of the certificate of conformity of such bankrupt, and the assignees or the creditor to whom according to such certificate the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a

writ of execution against the body of such bankrupt. The 259th section enacts, that if any bankrupt shall be taken in execution after the refusal of protection or after the refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the full period of one year except by order of the court. The granting of a certificate to the assignees or creditors under the above provisions has been held to be a merely ministerial act (*Re Cowgell*, 16 Q. B. Rep. 386; 15 Jur. 509). *Qz* where a bankrupt is in custody and detained upon such writ of execution, will a petition to the Insolvent Debtors' Court under the 1 & 2 Vic. c. 110 be sustained? Held, that a petition to be relieved from such custody is a nullity and will be dismissed. *Sem*ble, also, that if a bankrupt by concealing the fact of his bankruptcy had obtained his discharge, such discharge would have been held to have issued erroneously, and would have been revoked, and a warrant issued for his apprehension and recommitment to his original custody. *Re Charles Fox*, 26 Law Tim. Rep. 94.

DISCHARGE BY CREDITOR [1 Chron. 349].

—*Discharge by detaining creditor before the day of hearing—Insolvent at large on sureties.*—The practice of a detaining creditor of an insolvent sending a discharge to the prison shortly before the day of hearing of an insolvent debtor is often attended with great hardship to insolvents. In Ireland this has been remedied, but not so in England though here the commissioners do all they can to prevent the operation of the discharge, for the law is open to this abuse that a large creditor may bribe a very small detaining creditor to send a discharge to the prison the evening before the day fixed for the hearing, and so prevent an insolvent from having the benefit of an adjudication. No prisoner petitioning the court for the relief of insolvent debtors is entitled to the benefit of the act unless at the time of filing his petition, and during all the proceedings thereon he shall be in actual custody within the walls of a prison, or out on bail: Held, that when a discharge had been sent to the prison by the sheriff the evening before the day of hearing, that the jurisdiction of the Insolvent Debtors' Court is thereby terminated, and that the fact of an insolvent being at large on sureties, and attending the court on the day of hearing does not cure such defeat of jurisdiction. *Re Mitchell*, 26 Law Tim. Rep. 64.

DIVIDEND.—*Money paid by bankrupt to creditor after bankruptcy in reduction of debt to be accounted for out of dividend.*—It is the great object of the law of bankruptcy to make an equal distribution of the trader's assets among all the creditors, no preference being given, except under the statute, to any. It is

also well established that the future property of a bankrupt vests in his assignee under a certificate which is obtained, though where the produce is entirely from the personal skill of the bankrupt, the assignees are not in general entitled to it, and certainly a debtor to the bankrupt cannot set up their rights unless they interfere (see *Chippendale v. Tomlinson*, 4 Doug. 318; *Osborne v. Silk*, 1 Esp. N. P. C. 140; *Croft v. Poole*, 1 Barn. and Adol. 6; *Elliott v. Clayton*, 16 Qu. Ben. Rep. 581). But a commissioner in bankruptcy has nothing to do with such a question, for in directing the proper distribution of the assets he is bound to regard the general interests of the creditors. These observations will explain the following decision of Com. Bere:—The assignees of a bankrupt receiving money from him receives it as trustee for the creditors at large, and cannot appropriate it to his own benefit, whatever agreement he may make with the bankrupt. It is his duty to distribute the whole equally among the creditors. If an assignee retain in his hands or employ for his benefit any sum to the amount of £100, part of the estate of the bankrupt, he is not only liable to refund the same, but to pay 20 per cent. interest thereon. B. became bankrupt in 1815, and went to America; he returned in 1823, and died, leaving property. After paying all subsequent debts in full, a sum was paid to the official assignee, to be divided among his creditors in 1815. Among them was C., a creditor for £1,050, who was one of the original assignees. After B.'s return he paid to C. by various instalments £254 in respect of the debt due to him at the time of the bankruptcy. The question was whether C. should be charged with the amount so received as so much paid to him in reduction of his principal debt, and be allowed to receive an equal dividend with the other creditors on the balance or whether the amount should be treated as a dividend paid to him, and the other creditors paid an equal dividend before he was allowed any further dividend: Held, that the sum so paid must be treated as paid in respect of dividend, and not as so much money paid to him in reduction of the principal of his debt. *Re Elwood*, 26 Law Tim. Rep. 80.

PROTECTION PETITION.—*Interim order—Committal by county court—Discharge by insolvent court*—[1 Chron. pp. 276, 348, 383, 388, 457, 458].—An insolvent against whom an order of commitment has been made by a county court after obtaining an interim order of protection in respect of a debt duly inserted in the schedule will be discharged by the Insolvent Debtors' Court. *Re Stiles*, 26 Law Tim. Rep. 64.

PROTECTION PETITION.—*First examination—Exactions defence of an action* [1 Chron. 63]—

Contracting a debt without reasonable expectations of payment.—Where an insolvent vexatiously defends an action, and thereby increases the costs of the creditor: Held, that the extra costs incurred may be considered as a debt contracted without reasonable expectation of payment. *Re Laughton* 26 Law Tim. Rep. 64.

CRIMINAL LAW

ALEHOUSE LICENSE.—*Appeal to sessions* [ante, p. 57]—*Order to pay costs* [1 Chro. 454]—9 Geo. 4, c. 61, s. 27—12 & 13 Vic. c. 45 s. 18—*Estreat of recognisances by subsequent sessions*—3 Geo. 4, c. 46, s. 2—*Additional remedy.*—Sec. 2 of stat. 3 Geo. 4, c. 46 contemplates and provides for two classes of recognisances: 1. where they are forfeited out of sessions, in which case in order to give the clerk of the peace information of them, they are to be certified to him, the other where they are forfeited at the sessions, in which case the clerk of the peace takes notice of them, and is to copy them on a roll together with the former, and deliver them to the sheriff, but in neither case has the party an opportunity then of staying the hand of the clerk of the peace. The sheriff has thereby authority to levy the forfeited recognisances, and if anything is done *improvidently* or unjustly, the party has a remedy by ultimate recourse under sec. 5. The 11 & 12 Vic. c. 48, s. 27 prescribes the manner of recovering costs awarded by the quarter sessions upon appeals, and by the 12 & 13 Vic. c. 45, s. 18, the court of quarter sessions may upon all appeals order the one party to pay costs to the other. Upon appeal against an order refusing an alehouse license under stat. 9 Geo. 4, c. 61, the court of quarter sessions in October dismissed the appeal, and ordered the appellant forthwith to pay to the respondents or to whom they should appoint the sum of £22 16s. for costs. The order was drawn up for £22 16s. for the amount of the costs. The sessions were adjourned to November, and in the interval the clerk of the peace taxed the costs, and inserted the amount in the order. The January quarter sessions estreated the recognisances of the appellant and his sureties, upon proof that a demand had been made of the costs and non-payment: Held, first that stat. 12 & 13 Vic. c. 45, s. 18 did not take away the jurisdiction given by stat. 9 Geo. 4, c. 61, s. 27, to order costs on appeal from a refusal to grant an alehouse license but gave an additional remedy for enforcing such order. 2. That there was no forfeiture of the recognisances at the sessions in October or November, that the January quarter sessions had jurisdiction to order the recognisances to be estreated, under stat. 3 Geo. 4, c. 46, s. 2, and that the cases of *Rex v. Cossins*

(Park. 54, and *Reg. v. Just. West Riding*, 7 Ad. & El. 583), did not apply to show that the quarter sessions could not estreat the recognisances, and that the only mode of proceeding was by *scire facias* because they were both cases of recognisances for good behaviour, and there is a marked distinction between such recognisances, and recognisances to obey an order of the court of quarter sessions to pay costs. *Reg. v. The justices of Ely*, 1 Jur. N. S. 1017; Week. Rep. 1855-6, p. 5.

INFORMATION FOR PENALTIES.—*Smuggling—Costs of Crown*—17 & 18 Vic. c. 107, s. 213 [see now 18 & 19 Vic. 90, ante, p. 121].—By the Customs Consolidation Act (16 & 17 Vic. c. 107, s. 263) it is enacted that, "In all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, or the enforcement of any forfeiture under this or any act relating to the customs, the parties thereto shall be entitled to recover costs against each other in the same manner as if such suits or proceedings were conducted and had between subject and subject." &c. An information against two defendants for smuggling under the 16 & 17 Vic. c. 107, contained several counts, in each of which the defendants were charged severally. A verdict having by consent been taken against both on all the counts for the full penalties claimed, with an arrangement that execution should issue against each for a certain portion only, the remembrancer, on taxing costs against one of the defendants, under sec. 263 of that act, having allowed the crown costs on the whole record, the court refused to review the taxation. *The Attorney General v. Roberts and Ellis*, Week. Rep. 1855-6, p. 7; 1 Jur. N. S. 1024.

THE EXAMINATION ANSWERS.

We are always glad to receive any communications upon any matter in the CHRONICLE which may appear to our readers to be erroneous, and we give insertion to two communications we have received upon the Answers in No. 19 to the Michaelmas Term Examination Questions.

New Trial—Costs (ante, p. 190) *Appointment to Uses* (ante, p. 195).

Sir,—Your Answer to Question VI (Common Law, of the Examination Questions of Michaelmas Term does not meet the point of the question, which is not as to the costs of the rule for the new trial, but the costs of the first trial. The answer should be in the words of *Reg. Gen. Hil. Term*, 1853, No. 54, "If a new trial be granted without mention of the costs of the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed in the second." [This is quite correct; we know not how we came to mistake the question.]

In reference to the answer to Question VI (Equity), I beg to observe that I doubt its correctness. Had I been under examination, my answer would have been that B. took no interest whatever, but that C. took a *legal* life estate and D. a *legal* tenancy in tail. Had the appointment been to *and to the use of* B. and his heirs, to the use of C. for life, remainder to the use of D. and the heirs of his body, then I think that the answer would have been correct, because the Statute of Uses would only execute the first use, which, as it would be of the complete fee, would leave C. and D. to their equitable remedy. But in the case put by the question the *first* use is to C. of only a life estate and the remainder over to D. of an estate tail, both of which I conceive would become immediately legal estates by virtue of the statute. A. having the ultimate reversion in fee in case of a failure of issue of D., and D.'s estate tail was not barred. Perhaps you will kindly look again into these matters; and, if I am wrong, correct me in your next number.

I am, &c.,

JOHN R. ADAMS.

[In this last question and answer our correspondent is wrong, but only because he has overlooked the fact that A. had nothing but a *use* to appoint or rather limit; to appoint the use to B. and his heirs was to limit a use upon which none other could be limited so as to be executed into a legal estate.—Eds.]

Conveyances (ante, p. 192—*Feme Covert's Interest* (ante, p. 195).

GENTLEMEN,—Allow me to call your attention to two points connected with your Answers to the Michaelmas Term Examination Questions appearing in your last number.

The first has reference to what would perhaps be more properly noticed under the head of "Erratum" in your next, and I only mention it here in connection with my other observations. I allude to the answer to question I. of Conveyancing; in which you state (p. 192) that the statute providing for corporeal hereditaments lying in grant is 18 & 19 Vic. c. 106, instead of 8 & 9 Vic. c. 106, s. 2. The mistake is evidently a misprint, and would not be very likely to mislead [Our correspondent is quite correct.—Eds.] The other point relates to answer IV. in Equity—*Feme Covert's Interest* (ante, p. 195). With great deference for your opinion, I would suggest that an answer more in accordance with what appears to me to have been the intentions of the examiners may be given. It seems to me the question was intended to elicit a brief statement of the distinction which exists at common law and equity in regard to a married woman's interest, and which

might be done shortly thus: the interest which a married woman may become entitled to, is dealt with, or considered, by a court of law as the absolute property of the husband, while by equity, or the Court of Chancery, it is dealt with, or considered, as the wife's, and a settlement thereof to her separate use would be directed to be made. And if the husband were to proceed at law for the recovery, an injunction would be granted to enforce the wife's equity to a settlement, when, if there were no circumstances shown whereby her equity had become lost or suspended by misconduct, &c., such settlement would be decreed.

This appears to me to have been the purport of the answer required, but if I am wrong perhaps you will kindly correct me. [We cannot venture to say our correspondent is wrong on a question which we confess we do not understand. Perhaps some other of our subscribers can enlighten us.—Eds.]

I am, &c.,

W. HENRY RANDLE.

LEADING DOCTRINES OF THE LAW.

Chattels Personal—Titles by Occupancy and by Invention.

Under this title we propose to go through the whole of the practical part of the law, giving such short propositions as may be conveniently learned by the reader. In doing this we follow the order of Stephen's Commentaries, and to which these articles may be considered either as an introduction, a companion, or a substitute. We commence with vol. 2 of Stephen, as the subject of real property law is elsewhere handled from Burton's Compendium. The object of these papers is to present in a readable compass the chief propositions or doctrines of the law, both for students and practitioners—for students as smoothing their path and introductory to larger works—for practitioners as reminders of matters which they may have forgotten or overlooked. The only merit they can lay claim to is the presenting in a very condensed form the pith or marrow of the law, and it is hoped they will be found trustworthy, and being easily mastered, will be of service to our readers. The practitioner who may not have time to enter on the perusal of a formal treatise, will here find matter which, without demanding too much time or labour, will certainly furnish him with valuable information, and which, if duly treasured up in the memory (which may easily be done) will be of service in the course of his practice. It is also hoped that the student will derive not a little assistance from these propositions, which will form a groundwork for his subsequent studies. Every

one who commences the study of the law for the first time knows how indistinct is the knowledge he obtains from the perusal of a law work, arising chiefly from an inability to get at any distinct and definite propositions which he can carry in his mind. It is conceived that a student with a very moderate memory and diligence may manage to make himself master of the propositions here given, and he may then rest assured that he will be in a condition to read any law book with profit, and even to discuss topics which persons who have read larger works will be found unable to comprehend. Indeed, one main object of the propositions here given is to furnish the reader with definite notions which shall enable him to form a judgment upon matters of a similar nature occurring in practice or in the course of conversation or discourse.

CHATELS PERSONAL.

Chattels.—By the term chattels is meant, in general, not only moveable property but also leasehold interests in lands, &c.

Things personal.—*Chattels personal.*—Things personal and chattels personal are used to signify moveable goods, as they are termed (excluding chattels real or interests in realty), and also the incorporeal rights which grow out of them or are incident to them, such as patent-right, copyright, &c.

Moveables, what?—Moveables consist 1. of inanimate things, as goods, plate, &c., and the severed fruit or severed parts of a plant, and even the whole plant when severed from the ground; 2. animate things, or animals.

Domestic Animals.—In domestic animals, as horses, sheep, poultry, &c., a man may have an absolute property.

Wild Animals.—Wild animals otherwise called animals *feræ naturæ*, are not, in general, the subjects of property whilst living.

Qualified property in wild animals.—A qualified property may, however, subsist in wild animals, by a man's taming or confining them, such as deer in a park, hares or rabbits in an enclosed warren, doves in dove-houses, fish in a private pond, and even bees when hived.

Wild animals confined, &c., go with realty.—Wild animals, tamed or confined, partake of the nature of the realty, and go in general to the heir, and not to the executor. But notwithstanding Coke (1 Inst. 8 a. i.), deer in a park may be so tame, and reclaimed as to pass to the executors as personality. *Morgan v. Abergavenny*, 8 Com. Ben. 768.

Wild animals straying.—If a wild animal regains his natural liberty, the ownership ceases, unless there be an *animus revertendi*, or unless immediately pursued and recovered.

Action for wild animals.—While the ownership lasts an action will lie against a stranger for destroying or detaining wild animals (see 1 Law Chron. p. vii).

Using dogs for draught.—The 17 & 18 Vic. c. 60, to prevent the use of dogs for the purpose of drawing trucks, &c., in the country, is given in 1 Law Chron. pp. 154, 155. Also for the recovery of food supplied to impounded animals.

Liability of owner for injuries done by mischievous animals.—Whoever keeps a mischievous animal, either domestic or *feræ naturæ*, with knowledge of its mischievous propensities, is bound to keep it secure at his peril, and is *prima facie* liable to an action on the case at the suit of any person attacked or injured by the animal, without any averment of negligence or default in the securing or taking care of it; the negligence is the keeping such an animal after notice (*May v. Burdett*, 16 Law J., Q. B. 64). A declaration in case stated that the defendant wrongfully and injuriously kept a ram, well knowing that he was prone and accustomed to attack, butt, and injure mankind; and that the said ram, while the defendant so kept the same, attacked, butted, and threw down, and thereby hurt the plaintiff: Held, sufficient on motion in arrest of judgment, without showing that the defendant negligently kept the same (*Jackson v. Smithson*, 15 Mees. and W. 563; 4 Dowl. and L. 45; see *Charlwood v. Grey*, 8 Car. and Kirw. 46; *Hudson v. Roberts*, 6 Exch. Rep. 697).

Stealing Wild Animals.—To steal wild animals in which there is a qualified property, if they be fit for food or for the service of man, is felony at the common law; but it required the express provision of the statute law to punish a man for stealing those kept for pleasure; and see 7 & 8 Geo. 4, c. 29, s. 31; and, as to dogs, 8 & 9 Vic. c. 47; the jurisdiction is given to justices of the peace.

Trespasses in search of game.—See 1 Law Chron. pp. 455, 456.

Qualified property in young animals. The owner of lands has a qualified property in young animals born in his trees, or in holes in his ground, until they escape.

Dealers in game—License.—Selling, or contracting to sell game at unlawful seasons (see 1 Law Chron. pp. 343-4).

Property in chattels personal.—Property in chattels personal is either in possession or in action.

Property in possession, twofold.—Property in possession is either, 1st, absolute; or 2nd, qualified.

Qualified property.—This is either, 1. because the thing is not capable of absolute dominion, as above shown as to wild animals, &c.; 2. on account of the peculiar circumstances of the owner, as in the case

of the delivery of goods to another (called bailment) for particular use.

Bailment.—On bailment of goods (not being to a mere servant) the bailor has only the right, the bailee having the possession and also a temporary right, and each may maintain an action against a wrong doer, though trespass will not always be the proper form of action (see *Princ. Com. Law* 160, 232; *Nicholls v. Bastard*, 2 Cr. Mees. and R. 659; 7 Bacon's Abr. tit. Trespass, c. 2, p. 654, 7th edit.).

Finding goods.—The finder of lost goods has a special property which he may assert against any one but the real owner. The finder of goods knowing the owner at the time of the finding is guilty of larceny if he do not restore them (1 Law Chron. 346).

Execution—Distress.—The sheriff seizing goods on an execution has a special property in them, but a landlord distraining goods for rent has no such property: they are merely in *custodia legis*.

Property or chose in action.—Property in action is where a man has a mere right to recover anything by a suit or action at law—hence called a chose in action. The right of action may be for either a debt or damages.

Interests in personalty—Life interest—No estate tail.—A man may have the whole property in a chattel personal, or have merely a life interest, or even one for years. But there can be no estate tail in a chattel personal: it not being within the words of the statute *de donis*: a gift by deed or will of such a chattel to A. and the heirs of his body gives him the whole property. So note the difference between an attempted entail of a chattel personal, and of an interest partaking of the realty, but not actually within the statute *de donis*, which gives a determinable fee.

Remainders in chattels.—Remainders in wills were always permitted of chattels personal, but not so in deeds, but now they are good.

Injunction to protect personalty.—The interests of a remainder-man in personal chattels will be protected by an injunction.

Joint-ownership.—There may be tenants in common and joint tenants of personal chattels, but not coparceners.

No joint-tenancy in trade.—Partners are not joint tenants of their stock in trade, and therefore the survivor will not acquire the share of the deceased. However, the legal remedy on contracts survives, but the representative of the deceased will be entitled in equity.

Legal title—Use or trust.—One man may have the legal property in chattels personal to the use of or in trust for another, which is not executed or affected by the statute of uses.

Title to personal chattels, may be acquired by—1, Occupancy; 2. Invention; 3. Gift and Assignment; 4. Contract; 5. Bankruptcy and Insolvency; 6. Will and Administration. Also by prerogative, forfeiture, custom, succession, marriage and judgment.

TITLE TO CHATTELS PERSONAL BY OCCUPANCY.

Goods without an owner belong, in general, to the Sovereign.

Goods of alien enemy.—The goods of an alien enemy resident here before hostilities are not liable to be seized; but it is otherwise of goods brought here by him after a declaration of war.

Alien enemy suing.—An alien enemy cannot sue upon a contract made before hostilities, until hostilities have ceased (see 1 Chron. p. 290).

Ships captured at Sea.—Where an English vessel or property therein has been captured by the enemy, and is then re-captured, the original owner is entitled to same on payment of salvage or compensation.

Taking animals *feræ naturæ*.—Every person may in general pursue and take on his own lands, or at sea, any wild birds, fish, or beasts, but certain persons have an exclusive right by virtue of franchises of warren, chase, and free-fishery.

Killing and selling game.—The right to kill game is in the owners of the land (excluding occupiers for short terms), or in persons having their permission, but a yearly certificate must be taken out by them, and also by sellers of game (see 1 Law Chron. pp. 343, 344).

Killing hares.—Any person in the occupation of enclosed lands, or any owner having a right to kill game, may, in person or by an agent appointed in writing, kill any hare on such enclosed land without any certificate.

Pursuit and killing of wild animals.—If a man starts any wild animal on his own land, and follows it into another's, and kills it there, he is entitled to it. If a man starts an animal on another's private grounds, and kills it there, the owner of the lands is entitled to it; if he kills the animal on the ground of a third person, he is entitled to it, though guilty of two trespasses. It is otherwise where the starting and killing are in different warrens or chases.

Property from accession.—If any person's substance is improved or added to (not being changed into a new substance), by another, without his consent, the original owner is entitled to the substance in its improved state. The young of animals belongs to the owner of the mother, except in the case of young cygnets, which belong equally to the owners of the male and female.

Confusion of goods.—If one wilfully intermixes his money, corn, &c., with that of another person, so that the respective shares cannot be distinguished,

the entire quantity belongs to him whose consent was not given.

TITLE TO CHATTELS PERSONAL BY INVENTION.

Patent right, what.—A patent right is an exclusive privilege granted by the Crown (by letters patent), to the first inventor of any new contrivance in the manufactures, to make such articles during a limited time.

Privilege granted under 21 Jas. 1, c. 3.—By the above statute, letters patent for the term of fourteen years may be granted for the sole working or making any "new manufacture within the realm" not in use by others to the true and first Inventor thereof.

Prior user.—The prior deposit of articles of novel manufacture in a warehouse for sale is a sufficient publication, to defeat a patentee's claim to novelty in the invention of similar articles (*per* Jervis, C. J. in *Mullins v. Hart*, 3 Car. and Kirw. 297). The prior use of an invention which invalidates a patent is a use by persons in carrying on their trade without concealment (*Heath v. Smith*, 3 El. and Bl. 256; 18 Jur. 601; 23 Law Jour. Q. B. 167).

Patent for an addition.—Patent may be taken out for an addition by way of improvement to an article already in existence.

Improvements.—A claim for a patent for improvements in the mode of doing anything by a known process is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the improvement claimed and their application (*Electric Telegraph Company v. Brett*, 20 Law Jour. C. P., 123; 15 Jur. 579).

Combination of new and old matters.—There may be a patent for combination of new and old matters, as new and old mechanism, and such patent will be infringed by using so much of the combination as is material. Where a patent is granted for a combination of several things, some of which are old and some new, the question for the jury is whether, taking the specification altogether, that which is claimed as a whole is new (*Sellers v. Dickenson*, 5 Exch. Rep. 312; 20 Law Jour. Ex. 417; *Newton v. Grand Junction Railway Company*, *Ibid.*).

Applying old article to new use.—The application of a known article to a new use, the mode of application not being new, cannot be the subject of a patent (*per* Lord Denman in *Reg. v. Butler*, 3 Car. and Kirw. 215).

Application of process to different object.—A patent cannot be supported for the application of a process already known, producing a known result, unless

the object to which the process is applied is different from the object to which it was formerly applied, and the question whether the object is different, is one of fact for the jury (*Steiner v. Heald*, 17 Jur. 875).

Use in a foreign country.—Though the invention must not have been used, or even known, or communicated to the public in England, yet its previous notoriety in a foreign country is no objection. And the circumstance of the original inventor having, for a valuable consideration, parted with his interest in the discovery to a person in a foreign country, is no bar to his right, or that of his nominee or grantee in trust, to take out a patent in England for the same invention (*Beard v. Egerton*, 3 Com. Ben. Rep. 97).

Granted to a subject in trust for a foreigner.—A patent granted to a British subject in his own name for an invention communicated to him by a foreigner, the subject of a state in amity with this country, is not void, although such patent be in truth taken out and held by the grantee in trust for such foreigner. In such case, the grantee is the true and first inventor within this realm, within the statute 21 Jac. 1, c. 3 (*Beard v. Egerton*, 3 C. B. 97).

Simultaneous discoveries.—Where two persons make a simultaneous discovery, he who first obtains a patent before publicity is entitled to enjoy the privilege.

Patent, how obtained.—A patent is obtained by petition to the Crown, supported by a declaration in lieu of an oath, and accompanied by a provisional specification or, in lieu thereof, a complete specification; the matter is then referred to one of the law officers of the crown to report upon.

Complete specification.—If not previously filed, the patent always limits a time for filing a complete specification, by which the inventor puts the public in full possession of his secret, so that any person may be able to avail himself of it on the expiration of the patent.

Construction of specification.—In the construction of a specification the whole instrument must be taken together, and a fair and reasonable interpretation given to the words used in it (*Beard v. Egerton*, 3 Com. Ben. Rep. 165; 19 Law Jour. C. P. 86). A patentee describing his invention in the specification is to be taken to claim as part of his invention all which he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention (*Tetley v. Easton*, 2 Ell. and Bl. 956; 18 Jur. 350; 22 Law Jour. Q. B. 77).

Assignment of patent—Licence to use.—A patent may be assigned by a writing under hand and seal. The patentee may also grant deeds of licence to any other person to manufacture the article.

Assignment of patent to more than twelve persons is, in general, an avoidance of the patent, but a patent is not avoided by an assignment to trustees for the benefit of the creditors of the patentee, though they may exceed twelve in number (McAlpine v. Mangnall, 3 Com. Ben. Rep. 496).

Extension of term of patent.—A patentee who has not reaped the full benefit of his invention may petition her Majesty in council for a prolongation of his term of protection. The power of renewal given to the Crown by the 5 & 6 Will. 4, c. 83, s. 4, to grant new letters patent, after the expiration of the term for which the original letters patent were granted, if the petition is presented and referred to the Privy Council, and the report made in favour of the grant, before the expiration of the term, extends to assignees as well as grantees of patents (Ledsam v. Russell, 16 Law Journ. Exch. 145).

Remedy for infringement of patent.—For the infringement of a patent the inventor may bring an action for damages, and may obtain in a common law court (1 Law Chron. 240, 812), or in a court of equity, an order or injunction to restrain the further use of the invention.

Infringement of part.—Where a patent is for an invention consisting of several parts, the imitation of any part of the invention is an infringement of the patent (Smith v. London, &c., Railway Co., 17 Jur. 1071).

Inspection.—The 42nd sec. of 15 and 16 Vic. c. 83, empowers a court of common law to order "an injunction, inspection, or account" in an action for the infringement of a patent; under this provision an inspection of machinery will be granted, but not without its being shown to be material (Avries v. Kelsey, 16 Jur. 1046; see also Victi v. Smith, 3 El. and B. 960; 1 Law Chron. 126, 240, 812; Shaw v. England, 22 Law Journ. Ex. 26).

Account at law.—See 1 Law Chron. p. 126; Holland v. Fox, 23 Law Journ. Q. B. 211.

Account in equity.—Equity grants an account of the profits made by the infringement only as incident to the injunction. Where, therefore, no case is made out for the injunction an account will not be decreed (Smith v. London, &c., Co., 1 Kay, 408; 23 Law Journ. Ch. 562; also 1 Law Chron. 126).

Infringement—Acts not intention.—In determining whether a defendant has infringed a patent, no question arises as to his intention, but only as to his acts (Stead v. Anderson, 16 Law Journ. C. P. 250; 11 Jur. 877).

Repealing patent.—A patent is open to objection on an action or suit to enforce the patentee's right and also by a writ of *scire facias* for its cancellation.

Court of Common Law cancelling letters patent.—On *scire facias* brought in the Petty Bag Office in

Chancery to repeal letters patent for an invention, if issues of fact are joined there, the record is sent to the Queen's Bench for a trial; which being had, and a verdict found for the Crown, the Queen's Bench, though the letters patent remain in Chancery, may give judgment that they be revoked, cancelled, vacated, disallowed, annulled, void, and invalid, and be altogether had and held for nothing, and also that the enrolment thereof be cancelled, quashed, and annulled, and that they be restored to the Court of Chancery, there to be cancelled (Bynner v. Reg., in error, 9 Q. B. Rep. 523). If on such a verdict a direction be given that the letters patent be restored to the Court of Chancery to be cancelled, the Lord Chancellor has no jurisdiction to stay the judgment, his duty in cancelling the enrolment being only ministerial (Reg. v. Eastern Archipelago Co., 4 De Gex M. and Gord. 199).

Attorney-General's control over proceedings to repeal patent—Security for costs.—The Attorney-General conducts the proceedings on a *scire facias* according to his own judgment and discretion, and may when he thinks fit, stay the proceeding, or enter a nolle prosequi. The control which the Attorney-General exercises is subject only to the responsibility to which every public servant is liable in the discharge of his duty, and subject to the jurisdiction which the courts may have over him, upon a charge properly brought against him for a negligent or erroneous performance of his duty. In the ordinary course of proceeding upon a writ of *scire facias* to repeal letters patent, it is within the discretion of the Attorney-General to determine upon what or whose information, or on what terms or security, he will permit the action to be prosecuted, and the exercise of his discretion, in the conduct of the action, is not subject to the control of the court in which the proceeding takes place. The practice of requiring security from the prosecutor in a *scire facias* to repeal a patent is not founded on any law or rule of the court, but seems to have been very properly introduced by the authority of the Attorney-General alone, almost within living memory. There is no instance whatever of the court having interfered upon that subject (Reg. v. Prosser, 11 Beav. 306; 13 Jur. 71; 18 Law Journ. Chanc. 35).

Copyright, what.—Copyright is the exclusive right allowed by the law to an author of printing and reprinting his own original work.

Creature of statute law.—Copyright has no existence by the common law: it is the creature of the statute law. The statute of 8 Anne, c. 19, first created a copyright (Jefferys v. Boosey, 23 Law Tim. Rep. 275; 24 Law Journ. Ex. 81; 1 Jur. N. S. 615; 3 Com. Law Rep. 625; 1 Chron. 126).

Foreigners.—The statute of Anne, confers a copy-

right only on those who owe an allegiance, natural or temporary, to the Crown and first publishing here. A natural-born Englishman, domiciled abroad, acquires a copyright in his works by sending the MSS. and first publishing here. But a foreigner residing abroad does not acquire such rights, nor can he secure a copyright by sending an agent with his copyright to this country. But if a foreigner come here in person, though only for a temporary purpose, he will acquire a copyright in a book published whilst continuing to reside (*Jefferys v. Boosey, supra*; 1 Law Chron. 126).

Extent of copyright.—The 5 & 6 Vic. c. 45, gives a copyright for forty-two years from the first publication, or, if longer, for the author's life and for seven years beyond.

Piracy—Registration of copyright—Injunction.—To sustain an action for pirating the copyright (which must be commenced within twelve calendar months), it must have been registered at Stationers' Hall (*Murray v. Bogue*, 22 Law Journ. Chanc. 457; 17 Jur. 219). Courts of equity grant injunctions to restrain infringement of copyright.

Injunctions.—Courts of equity do not interfere in every case of alleged copyright. In cases of contested copyright, the courts are disposed rather to restrict than increase the number of cases in which they interfere by injunction before the establishment of the legal title; it will give great weight to the consideration of the question, which side is more likely to suffer by an erroneous or hasty judgment, and the prejudicial effect the injunction may have on the trial of the action (*Mc Neill v. Williams*, 11 Jur. 344). Now courts of equity can determine the legal rights of the parties without sending them to a court of law (15 & 16 Vic. c. 86, s. 66).

Contributions to periodicals.—There is a copyright in articles published in periodicals; actual payment for the article is a condition precedent to the vesting of the copyright in the proprietor of the work: a contract for payment is not sufficient (*Richardson v. Gilbert*, 1 Sim. N. S. 336; 15 Jur. 389; 20 Law Journ. Chanc. 553; *Sweet v. Benning*, 19 Jur. 543; 25 Law Tim. Rep. 180; *ante*, p. 73, 75; *Browne v. Cooke*, 11 Jur. 77; 16 Law Journ. Ch. 140).

Republishing contributions to encyclopædia, &c.—The proprietor of an encyclopædia, who employs a person to write an article for publication in that work cannot, without the writer's consent, publish the article in a separate form or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes (*Hereford, Bishop of, v. Griffin*, 16 Sim. 190; 12 Jur. 255; 17 Law Journ. Chanc. 210).

Assignment of copyright.—Copyright may be assigned, and is usually by deed, but an entry thereof at Stationers' Hall will of itself be sufficient. Without an absolute assignment of the copyright, no one but the author of a literary work can register it at Stationers' Hall. Where an entry is improperly made a court of common law will grant a rule to vary or expunge it (*exp. Bastow*, 14 Com. Ben. Rep. 631).

Assignment attested by witnesses.—*Per Lord St. Leonards*: An assignment of copyright, wherever made, and whether valid or not by the law of the country where made, will not be held valid in England unless it is in writing, and attested by two witnesses, Lord Brougham hesitating whether an attestation by two witnesses was not dispensed with by the 54 Geo. 3, c. 156 (1 Law Chron. 126; see *Davidson v. Bohn*, 12 Jur. 922).

Copyright in immoral publications.—No copyright can be claimed in works of an immoral, blasphemous, seditious, or libellous character, or put forth under false pretences (2 Story's Eq. Jurispr. 193, 2nd ed.).

Partial assignment and licence.—Copyright is in its nature an indivisible right; it may be transferred, but it cannot be divided. A partial license, however, is good (*per Lord St. Leonards in Jefferys v. Boosey, supra*; 1 Law Chron. 126).

Copyright in lectures, exists where notice has been given to two justices before the delivery thereof.

Copyright in dramatic pieces and musical performances, exists, the author of them having the sole liberty of bringing them out on the stage.

International copyright.—By the 7 & 8 Vic. c. 12, and the 15 & 16 Vic. c. 12, the Queen may, as to books, dramatic pieces, and musical compositions, prints, articles of sculpture and other works of art, first published &c. in any foreign country, by order in council allow the authors &c., privileges of copyright therein, for similar terms with books, &c., published in England. As to translations of books or dramatic pieces, the privilege is not to exceed five years. There must be a registration and a deposit of a copy of the work at Stationer's Hall, and a notification made on the title page of the work of a reservation of the right of translation.

Print.—The proprietor of a print claiming copyright under the 7 & 8 Vic. c. 12 must comply with the provisions of the 8 Geo. 2, c. 13 (*Avanzo v. Mudie*, 10 Exch. Rep. 203).

DEBATING SOCIETIES.

LONDON LAW STUDENTS' DEBATING SOCIETY

For Tuesday, December 11th, 1855,—president, Mr. Elgood,—A freehold estate was mortgaged in fee: firstly to A., secondly to B., and thirdly to C. B. neglected to give notice of his charge to the first mortgagee; and C., at the time of his advance, was ignorant of B.'s charge. A. devised his mortgaged estates to C. as trustee, who, under a power in A.'s mortgage, sold sufficient of the estate to pay off the first mortgage debt. During all the transactions the title deeds were in C.'s possession as solicitor for A. Is B. entitled to priority of charge over C. upon the unsold portion of the estate? (Barrett v. Weston, 12 Ves. 180; Morrel v. Paske, 2 Atk. 52; Wilmot v. Pike, 5 Hare, 14; Foster v. Blackstone, 1 Myl. and Ke. 297). Affirmative, Mr. Prudence and Mr. Wrentmore; negative, Mr. Williams and Mr. Caddick.

For Tuesday, December 18th, 1855,—president, Mr. Lawrence,—Is a husband liable for necessities supplied to his wife who has a separate maintenance, without anticipation, out of property brought by her into settlement, when the wife has been wrongfully turned out of doors by the husband, and the tradesman has no means of knowing that she has a separate income? (Muzed v. Peck, 7 L. J. Ex. 153; Emmeth v. Norton, 1 Car. and P. 606; Dixon v. Hurrell, 8 Car. and P. 713). Affirmative, Mr. Preston and Mr. Bruce; negative, Mr. Smith and Mr. Miller.

The society will adjourn until Tuesday, the 8th January, 1856.

BIRMINGHAM LAW STUDENTS' SOCIETY

Moot Point, No. 188.

Is the succession to chattels real governed by the *lex domicilii* of the deceased owner?

The rule of law on this point as laid down by text writers, and affirmed on general terms by the courts, is, that the succession to personal property is governed by the *lex domicilii* of the deceased owner.

It was contended in the negative of the moot point that the foregoing definition was too large, and that the words personal property must be read personal chattels or moveables on the ground that the rule was imported into our law from the civil law where the only recognised distinction was between moveable and immoveable property (Jarman on Wills, pp. 8 and 6), and that notwithstanding our law owing to the feudal principles which formerly governed the succession and disposition of real or immoveable property declares chattels real to be personal estate, they still retain their immove-

able or real character, and do not fall within the reason or spirit of the rule. In support of this construction of the proposition, the dictum of Story (Conflict of Laws, ss. 366, 367, 382 & 424), that mortgages and other liens on immoveable property take the nature and character of that property, and lose their original quality, was cited and it was argued that *à fortiori* of this would be the case with chattels real which the English law considers to partake more of the character of realty than mortgage debts; mortgage debts can be recovered by personal action (which is one of the reasons given in Co. Litt. 118 b., 1, for the division of realty and personalty in the English law) can be the subject of a *donatio mortis causa* are *bonâ notabilia* where the mortgage is; whereas chattels real are not recoverable by personal action cannot be the subject of a *donatio mortis causa* and are *bonâ notabilia* where the land lies, and moreover in all dispositions *intervivos* are governed by the rules common to other kinds of real estate rather than those which govern the disposition of chattels personal.

In the affirmative it was urged that the rule was in its origin established for the general convenience of nations and to prevent the confusion which would arise from the different laws governing the succession of personal property in the countries in which it might happen to be situate, a confusion which would be doubly increased if the negative were correct inasmuch as an intestate's chattels real would be distributable according to the *lex loci*, and his chattels personal according to the *lex domicilii*, although both are distributable as personal estate. It was also contended that if the *lex rei sitæ* declared the property to be personal estate it became although in its nature real divisible and subject to the same rules as governed the pure personalty of the owner, and consequently divisible by the *lex domicilii* citing Sill v. Warwick, 1 H. Blac. 690 where Lord Loughborough said, "It is a clear proposition not only of the law of England but of every country in the world where law has the semblance of science that personal property has no locality, but that it is subject to that law which governs the possession of the owner both with regard to the disposition of it, and with respect to the transmission of it either by succession or the act of the party, it follows the law of the person. If the owner dies it is not the law of the country in which the property is, but the law of the country of which he was a subject that will regulate the succession," the same doctrine was also advanced in Ewing's case (1 Crom and Jervia, 151) where on a claim by the Crown for legacy duty on foreign stock which the counsel for the appellant contended was in the nature of real estate, and local being only payable or transferrable in

the place where it was situate. Mr. J. Bayley observed on delivering the judgment of the court, "It was pressed by the counsel that this property was to be considered as being in the country in which it was real property but the circumstances mentioned on behalf of the Crown, viz., that the name of the executor was suffered to be introduced in the books that he was suffered to deal with the fund, and that his directions were followed as to the dividends, satisfy my mind that this is to be considered as personal property in the place where it is payable, and that consequently we are not warranted in considering this as real estate. If it is not real estate, it is personal estate, and if it is personal estate is it in any respect to be considered as different from personal property abiding in this country, there is no doubt but that the amount when you are receiving the dividends will be payable in the place in which by the constitution of these funds the dividends are payable, and that will be America, Paris, or St. Petersburg, but you are not to look at the place where the thing is payable or transferrable, but when you have ascertained that it is personal estate, then you are to ascertain what are the rules of law with regard to personal estate, that personal estate being at the time not locally situate in this country, but being at the time locally situate abroad. Now what is the rule with respect to it? The rule is that personal property follows the person and is not in any respect to be regulated by the situs, and if in any instance the situs has been adopted as the rule by which the property is to be governed, and the *lex loci rei sitæ* resorted to it has been improperly done."

There does not appear to be any express decision on the question. Mr. Jarman in his treatise on Wills contends for the negative, while in Hayes' and Jarman's concise forms of Wills the affirmative is mentioned as correct, and where also is cited an opinion in the affirmative of the Law Officers of Scotland. Vide also Story's Conflict of Laws, where the general principles applicable to the question are collected. The meeting decided in the negative.

Moot Point, No. 190.

Will an estate for years merge in a remainder for years?

All estates for years however differing in length being looked upon in law as estates of equal quantity, the answer to the moot point would depend upon the question whether an estate will merge in an estate of equal quantity or whether the absorbing estate must not be the greater.

In the 3rd Resolution in Lewis Bowle's case (11 Rep.) it is laid down that an estate tail after possibility of issue extinct does not merge in an

estate for life on the ground of the estates being equal. In Co. Litt. 273 b. it is also laid down that if a man make a lease for ten years the remainder for twenty years, and he in remainder release his right to the lessee, he shall have an estate for thirty years, for one chattel cannot drown another, and years cannot be consumed in years, vide also sec. 299 b., where the same position is maintained. Shepherd in his Touchstone (p. 303) states it to be essential to the operation of a surrender, that the surrenderee should have a greater estate than the surrenderor, and it should be mentioned that the same principles are applicable to merge as to surrender, the latter taking place in consequence of the assurance while the former arises from the construction of law on the situation of the parties.

The affirmative of this question is ably supported by Mr. Preston in the 3rd vol. of his "Treatise on Conveyancing," where, after referring to Lewis Bowle's case, and denying that that case supports the distinction he goes on to say (p. 222) "that as far as the decisions extend they would afford an argument in the affirmative of the moot point." No decisions are, however, referred to but no doubt the cases he refers to are those where it has been held that a fee simple conditional and a fee simple absolute cannot co-exist in the same person (vide Bishop of Sodor and Man v. Earl Derby, 2 Ves. Sen. 354; and Simpson v. Simpson, 5 Scott 770). In treating afterwards on the merger of estates held *per autre vie* Mr. Preston admits (page 230) "that the case put by Lord Coke and the 3rd resolution in Bowle's case favour the doctrine that there cannot be any merger as between equal estates."

It was admitted as settled that an estate for years might merge or be surrendered in the immediate reversion for years, but this does not appear to affect the question in the moot point, as these cases are decided on the ground that the surrender of the underlease merely accelerates the right of possession in the first lessee or reversioner by substituting the possession for the reversion.

The meeting decided in the negative.

Moot Point No. 191.

Does an action of debt lie for the recovery of arrears of rent in fee since the passing of 3 & 4 Wm. 4, c. 75?

At common law, and prior to the passing of the above statute, an action of debt would not lie for a rent in fee, in tail or for life while it continued a freehold interest, on the ground that the law would not suffer a real injury to be relieved by a personal remedy (vide Webb v. Jiggs, 4 M. and S. 113; Kelly v. Clubbe, 3 Brod. and Bing. 180). The statute of 3 & 4 Wm. 4, c. 27, having abolished all actions real,

it was contended in the affirmative that the maxim of *ubi jus ibi remedium* applied, citing an extra-judicial opinion of Pollock, C.B., in *Varley v. Leigh*, L. J. R. 1848, ex. 289, where he is reported to have said: "that as real actions were abolished, and there must be a remedy at law in their place, debt would be the proper one." On the other side it was urged that the above maxim only applied to cases of torts and where the action would be new in instance only, and not in principle; and as it would be altogether new in principle to bring debt for arrears of a rent in fee, there being no contract, express or implied, legislative interposition would be necessary before debt would lie (vide *Broom's Maxims* 2 edit. p. 148). It should also be mentioned that in the case of *Varley v. Leigh*, Parke, B. expressly guarded himself from being supposed to acquiesce in the Chief Baron's opinion.

THOMAS HORTON, Hon. Sec.

REAL PROPERTY LAW.

We purpose to give analyses of some of the principal works on the four practical branches of the law, which will afford us an opportunity of presenting to our readers a mass of useful matter, suited alike to the practitioner and to the student. We commence with real property law, and have adopted as a text-book the excellent, though rather abstruse work called "*Burton's Compendium*." We are told that this is a work which many students find it difficult to read, and we can readily believe it, but like all other good works when once mastered, it is found that the labour bestowed on it has not been thrown away. To facilitate its perusal is one of the objects of the following analysis, and we trust by our occasional remarks to clear away some of the difficulties of the reader. Our main object is to present a series of propositions on real property law which the reader may easily comprehend and bear on his mind, which will be found especially useful to those who have not the time or the inclination, or capacity, to read a work of close, and continued logical argument and arrangement.

INTRODUCTORY OBSERVATIONS.

Lands and tenements.—All the subjects of real property are comprehended under the words "lands and tenements" (pl. 1).

Land.—The word "land" is used to signify the surface and substance of the earth under all circumstances, though covered with water or buildings (pl. 2). Land in its legal signification has an indefinite extent both upwards and downwards, so as to include not only the face of the earth, but everything under it or over it (*Broom's Max.* 293, 2nd edit.; 2 *Black. Com.* 18). The maxims

applicable to the ownership of land are "*Cujus est solum ejus est ad celum*" and "*Quicquid plantatur solo solo cedit*."

Tenement.—The word tenement besides its confined sense as appropriated to the subjects of feudal tenure, includes not only land, but every modification of right concerning it, to which the law has attributed a substantive, though invisible being (pl. 3).

Incorporeal tenements consist of a right not to the possession of the land itself, but to some benefit to arise out of it, such as rents, commons, seignories, tithes, advowsons, local offices, &c. (pl. 4).

Hereditament.—The word "hereditament" is the most comprehensive, applying not only to lands and tenements, but also to some of the subjects of personal property, and to mere rights (pl. 5; see 20 *Law Tim. Rep.* 113).

Four kinds of laws applying to real property.—The laws by which real property is regulated are—1, the common law; 2, local customs; 3, rules of courts of equity; 4, the statute law (pl. 6).

Common law.—The common law, as it regards real property, has the feudal law for its foundation; and the judges have been its principal architects (pl. 6, 7).

Local customs are such exceptions to the common law as arise from the usage of particular places or districts (pl. 8).

Rules of equity.—The rules and usages of courts of equity are a system of a kind of secondary common law, applicable generally to matters in which the courts of law have no jurisdiction, but sometimes interfering with those courts, and correcting the law which they observe (pl. 9).

The statute law controls and supersedes all other laws, though itself directed by the interpretations of the courts.

Three kinds of real property.—There are three kinds of real property, viz., 1, legal; 2, customary; 3, equitable (pl. 11).

Estate.—The degree of property which a person has in lands or tenements, if sufficiently perfect, is called his estate (pl. 12).

OF ESTATES IN FEE SIMPLE.

Freeholds—Inheritance.—All estates are either estates of freehold or chattels. Some estates of freehold are also of inheritance, others not; and estates of inheritance are either in fee simple or in fee tail (pl. 13).

Feoffment—Deed required.—Formerly a feoffment need not have been by deed, but by the 8 & 9 Vic. a feoffment (not being by an infant of gavelkind lands) must be by deed; this deed must be accompanied by livery of seisin (pl. 20). But though not

accompanied by livery it may now have operation at least if there be words of grant, as by the 8 & 9 Vic. c. 106, all corporeal tenements and hereditaments as to conveyances lie in *grant* as well as in livery, i. e., they will pass by a grant without any livery (see Litt. Ten. p. 20, note to sec. 59).

"Heirs" in deeds.—The word "heirs" is in general essential in a deed to pass a fee simple (pl. 21).

Feoffment—Immediate estate.—A feoffment always confers an estate of freehold, either in actual possession or preceded by a mere chattel interest (pl. 22). This is true of every common law conveyance, including a *grant*. Therefore, a grant to A. of lands from Christmas next would not pass any estate. This is one of the most important doctrines in the law of real property, but it seems not to be generally understood. Fortunately, the rules as to the premises and habendum in a deed prevent in most cases any fatal result, for the statement in the premises is almost always of an immediate grant (though quite unintentional on the part of the draftsman), and the futurity is not mentioned until what the ignorant draftsman considers the proper place, viz., the *habendum* of the deed. Now the premises and habendum being repugnant, the former has efficacy and the latter is rejected (see Com. Dig. tit. "Fait." E.; Goodtitle v. Gibbs, 5 Barn. and Cres. 709).

Defeating estate.—In general, the estate given on condition by a feoffment, cannot be defeated without an actual re-entry.

Mortgage—Non-payment at the day.—By non-payment of mortgage money on the appointed day, the benefit of the condition is lost at law, but in equity the mortgagor may recover on payment of principal and interest within twenty years (pl. 24, 1458, note).

[We are sorry to find that want of space prevents us from giving more of the analysis in this number, which is the more to be regretted as our readers may consider from what is already given that the work is of quite an elementary character—a notion, however, which a further acquaintance with our analysis will show to be unfounded].

Barristers acting without intervention of attorneys.—We see the *Legal Observer* is still haunted with the notion that the junior bar are desirous to act for lay clients directly, i. e., without the intervention of a solicitor, but it is a pure invention so far as concerns the bar in general. There may be two or three in the Criminal Courts, who do not observe the usual professional rule.

PROFESSIONAL NEWS.

DEATH OF MR. COWLING.—This eminent member of the common law bar died on the 12th of Dec. last, his death being attributed to some spasmodic affection of the heart. He was in his 54th year, and born in Lancashire; the only son, we believe, of a physician. He was Senior Wrangler and first Smith's prizeman in the year 1824,—the late Dr. Bowstead, Bishop of Lichfield, being second to him in both examinations. He took the degree of Master of Arts, and was till his marriage a Fellow of St. John's College. He was a member of the Middle Temple, and called to the bar on the 9th of November, 1827, and went the Northern Circuit, where he was universally respected. Mr. Cowling was appointed Deputy High Steward of the University of Cambridge in 1839. He also held the honourable post of Standing Counsel to the University, to which office he was appointed in 1835. He was distinguished for his scientific and profound knowledge of law, and the accuracy and logical ability with which he brought it to bear on every case in which he was engaged. He was of a diffident temper and characterised uniformly by simplicity of character and honour both in private and professional life. No member of the bar was listened to by the judges with more manifest respect than Mr. Cowling.

MOOT POINTS.

No. 37.—*Election of Councillors—Casting Vote.*

Can the mayor and assessors of a municipal borough, after having voted during an election of councillors, give a casting vote in case of an equality at the termination of the election. If not, is the mayor alone entitled to give the casting vote. I will thank some of your readers to refer me to the latest authority on this point.

R. B.

No. 38.—*Personal Contracts.*

A. and B., two surgeons, enter into an agreement in due form for the sale to the latter of a medical practice at Audley. A., at the time stipulated for his relinquishing the practice, is desirous of evading the agreement, which B. seeks to enforce. Qy. Would a court of equity decree a contract of this nature to be *specifically performed*, it being laid down that "the very ground on which the jurisdiction of a court of equity in decreeing a specific performance is founded, is that it is able to give possession of every thing which is the subject of the agreement, and which a court of law cannot do." Perhaps some of your correspondents will be good enough to state their opinions.

CHARLES HILDITCH, JUN.

No. 39.—*Landlords and Tenants (Farmers).*

A. lets to B. a farm (100 acres) upon the ordinary terms of letting and taking farms. The tenant expends considerable sums of money in improvements upon the farm in the shape of bones, draining, &c., whereby the farm is much improved in value. In the course of 18 months or two years the landlord gives the tenant notice to quit, with which notice the tenant complies, greatly to his damage. It has been put forth to the mooter that the tenant can, under these circumstances, recover from the landlord due compensation for his outlay. In the absence of a special agreement, or a custom to that effect, I am most decidedly of opinion that the tenant is without remedy, but should like to be borne out by some more experienced head. I should be glad to see a sound answer upon the question in your next number, and to learn if such a custom exists in any part of this country.

CHARLES HILDITCH, Jun.

No. 40.—*Appointment of new Trustees.*

A lady being possessed of some bank shares and a policy of assurance, assigns them previous to her marriage to two trustees upon certain trusts, and reserves to herself a power to appoint new trustees under the settlement, which runs thus: "provided always and it is hereby agreed and declared that if the said T. W. T. and J. T., or any trustee to be appointed as hereinafter mentioned, shall die or become desirous of being discharged, or refuse or become incapable to act, then and so often the said Eliza T. may appoint any other person to be trustee in the stead of the trustee so dying or desiring to be discharged, or refusing or becoming incapable to act." One of the trustees appointed by the settlement is going to the Crimea, and is therefore desirous of being discharged from the trust, and Mrs. T. wishes to appoint another in his stead, but it is conceived that by the language of the power she cannot do so. It is submitted that the words "that if the said T. W. T. and J. T. or any trustee to be appointed &c.," are to be read conjointly and not disjunctively, and that it is only in the event of both the trustees appointed by the settlement dying, desiring to be discharged, refusing, or becoming incapable, that she can appoint, and then her power seems to be confined to one only. It is conceived that it is quite competent for J. T. to retire from the trust, and the mooter is of opinion that the trust estate will vest absolutely in T. W. T. If such be the case, what is the proper course to be adopted? It is thought that the present trustees should assign the estate to a dry trustee, and that then he should re-assign to T. W. T. in order to vest the estate absolutely in him, and should the husband join in the assignment?

J. G. B. EDWIN.

No. 41.—*Death of Incumbent—Rent.*

An incumbent dies in April, possessing glebe sown to wheat. He underlets to C. C. is entitled to the emblements; but who is entitled to the rent from the death of the incumbent to the time of harvesting the seed—the new incumbent, or the representatives of the old one?

A. H. MORTON (Louth).

No. 42.—*Devise of Wood.*

A testator by his will devises to his wife all the wood growing upon a certain tract of land that is not required to stand for timber. What would be the effect of such a devise.

A. H. MORTON (Louth).

No. 43.—*Tacking Mortgage.*

A. mortgages his property to B. in 1804. In 1805 A. executes another mortgage of the same property to C., and in 1809 he executes a further mortgage thereof to B. The same solicitor was employed in all three transactions. As no notice was given by C. of the second mortgage, could B. tack his mortgage of 1809 to that of 1804?

A. H. MORTON (Louth).

No. 44.—*Municipal Voting Paper.*

It is required by s. 32 of the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, "that every burgess entitled to vote in the elections of councillors may vote for any number of persons not exceeding the number of councillors then to be chosen, by delivering to the mayor and assessors, or other presiding officer, as hereinafter mentioned, a voting paper containing the christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions, such paper being previously signed with the name of the street, lane, or other place in which the property for which he appears to be rated on the burgess roll is situated." An error was made in our burgess list by calling a man A. R., Jun., whereas his name was W. R. At the last election he presented his voting paper, signing himself A. R., Jun., according to the list, and also mistaking the name of the street for which his property was rated. This paper he presented to the returning officer, which was accepted. Subsequently, finding that he was in fault, he filled up a new voting paper, signing himself aright, and stating the proper name of the street, and presented it, but the returning officer refused to take it, stating that he had already voted—consequently the previous vote was disallowed.

Is a burgess entitled to vote again when he has unwittingly presented an invalid paper? providing that he makes no other alterations than the correction of errors,

A. H. MORTON (Louth).

REAL PROPERTY LAW.

(Continued from p. 237).

OF ESTATES IN FEE SIMPLE (continued).

Restraining total alienation.—A condition annexed to an estate in fee prohibiting all alienation is void (pl. 26).

Who can take advantage of the condition.—Where a condition prohibits alienation only to a partial, and, therefore, lawful extent, the only persons who can take advantage of the condition are the feoffor and his heirs (pl. 27).

It does not seem clear that an assignee of the condition might not enter since the 8 & 9 Vic. c. 106, s. 6, as to which see *Hunt v. Bishop*, 8 Exch. Rep. 675; 21 Law Tim. 92.

Reversion and remainder.—On a grant to one for life, the residue of the grantor's estate remains with him, and is called a reversion. If the grantor after the life estate grants to another, the latter is said to have the remainder. In the case of the reversion, there is a tenure between the grantor and his tenant for life, but in the case of the remainder there is no tenure. Note, that reversion is sometimes used to signify such a right of future possession as does not in the meantime amount to an estate (pl. 28—30).

Vested and contingent remainders.—On a grant to A. for life, remainder to B. in fee, &c., the remainder is said to be vested. On a grant to A. for life, and in case C. returns from Rome, then to B. in fee, or to A. for life, remainder to an unborn person, the remainders are said to be contingent.

Contingent remainder, freehold to support it.—A contingent remainder of freehold must have a particular estate of freehold to support it.

Formerly it was a rule that whenever an ulterior estate came into possession before the happening of the contingent event, the contingent remainder failed.

In other words, every contingent remainder must have become vested during the continuance of the particular estate, or immediately upon its determination (pl. 32—34).

But now, by the 8 & 9 Vic. c. 106, s. 8, the above two last-mentioned rules do not apply where the act which formerly caused the failure is brought about by the premature determination of the particular estate, but a determination occurring in accordance with the limitations will still cause the contingent remainder to fail.

Joint tenants.—On a grant to several persons and their heirs they are joint tenants in fee simple; the last survivor will, if the joint tenancy be not severed, take the whole (pl. 35).

Alienation by joint tenants.—A joint tenant cannot

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alien more than his own share; if they all join in one conveyance, each gives but his own part (pl. 36, n).

Tenancy in common, how created.—Besides stating that the grantees shall take as tenants in common, they will so take, if the grant be of the one moiety to the one and the other moiety to the other. So if the grantor gave only a moiety of his land to the grantee, the latter and the grantor would be tenants in common (pl. 37 n.).

Severance of joint tenancy.—If one of the joint tenants aliens his share, his alienee and the other are tenants in common; if one of these so aliens, the alienee and the two others are tenants in common, but the two original parties are, *inter se*, still joint tenants (pl. 37).

Seisin and possession.—No survivorship on tenancy in common.—Each joint tenant is said to be seised of the whole land; a tenant in common is not so seised, though he is said to be in the occupation of the whole. The share of each tenant in common goes to his heirs and not to the survivor.

Remainders, how granted.—As a feoffment requires delivery of possession, a reversion or remainder where the particular estate is not a term of years cannot pass by a feoffment, strictly so called, but a grant is necessary, upon which no attornment is requisite (pl. 39, 42; Co. Litt. 48 b; 52 a, 332 b; Litt. s. 551; *Vigers v. Dean of St. Pauls*, 14 Jur. 1017).

Lying in grant and in livery.—Lands were said to lie in livery; other subjects of real property in grant (pl. 40; *Thomas v. Fredericks*, 10 Qu. Ben. 775). But now by the 8 & 9 Vic. c. 106, s. 2, lands so far as concerns the conveyance of the immediate freehold thereof lie in grant and accordingly they are now usually passed by grant.

Releases by reversioner.—A release by a reversioner must be to the tenant or owner of the particular antecedent vested estate, created by the same instrument as the released estate (pl. 44, 45, 51).

Releases of a right.—A release of a mere right may be made to any person who has a vested estate in the premises, whether in possession, reversion or remainder; but if a freehold estate the releasee must have an estate of that degree (pl. 46).

Releases operating for benefit of others than releasee.—Such a release (*viz.*, of a right) will, except as to joint tort feisors, operate for the benefit of all persons entitled to the premises by the same means as the releasee.

No release of estate without privity of estate.—A joint tenant may release to his co-tenant, but one tenant in common cannot release to the other tenant in common, as there is no privity of estate between them (pl. 50).

For the same reason if land be given by C. to B. for life who leases to A. for twenty-five years, the release of C. to A. is strictly not good for want of privity of estate (pl. 53).

Privity of estate exists only where both estates are acquired by the same instrument, or the one derived immediately out of the other (pl. 53).

However, it is clear that if there were no particular objection on other grounds, an instrument purporting to be a release would operate as a conveyance, and indeed now the immediate freehold of lands lies in grant there is scarcely a case in which operation would not be given to a deed purporting to be a release.

Different effects of releases and grants.—A grant conveys a remainder or reversion (and now also the immediate freehold), whilst a release enlarges the particular estate, which enlargement, however, does not take place where a third estate is interposed between that of releasor and lessee (pl. 54).

Different effect of release and grant to tenant at will.—A release to a tenant at will is good, but a grant of the reversion, as such, to a third person is not proper, but now it would operate as a grant of the immediate freehold and determine the tenancy at will (pl. 55).

Release to tenant at sufferance.—No release, as such, can be made to a tenant at sufferance, there being no privity of estate (pl. 56), but doubtless it would operate as a grant.

SOLICITORS AND ARTICLED CLERKS.

Re-admission in Chancery not recognised in Common Law Courts.—Service to a Chancery solicitor and admission in Chancery recognised in Common Law Courts.—Two decisions of some practical importance have been given on the above subjects. In the first case, exp. Simons, 26 Law Tim. Rep. 205; Week. Rep. 199, it was held by Mr. Just. Erle, that the fact that a person is already re-admitted a solicitor in Chancery is no ground for dispensing with the usual notice on his application to be re-admitted an attorney—a rather singular and hard decision. In the second case, re Lucas, 2 Jur. N. S. 65, it was held by the Court of Queen's Bench, that a person who has been admitted a solicitor of the Court of Chancery upon service with a solicitor (who had not been admitted an attorney of a court of law) may be admitted an attorney under sec. 15, of the 6 & 7 Vic. c. 73, notwithstanding Reg. Gen. Hil. T. 1853, r. 5. In this case the affidavit of the applicant Mr. Lucas stated that in pursuance of articles of clerkship duly executed on the 6th August, 1846, he served the late Thomas Hill Mortimer, a solicitor of the Court of Chancery (who had never been admitted as an

attorney of a court of law), as his clerk for the full term of five years; that after an examination, before the examiners duly appointed, touching his fitness and capacity to act as a solicitor, he was on the 20th November, 1851, duly admitted and enrolled a solicitor of the said court, and had ever since been in constant practice as a solicitor in the Court of Chancery. On the 20th November, 1855, he applied to Erle, J., at chambers, to grant a fiat for his admission at common law, who was of opinion that the grant of the fiat would be within the intention of stat. 6 & 7 Vic. c. 73, and that the courtesy which one court shewed to the acts of another court would be ground for granting the application; but as it might not be considered as coming within the Reg. Gen., Hil. T., 1853, rule 5 (see 1 El. and Bl., App. II, p. lix), which required that the notice of the person proposing to be admitted an attorney should state "the name and place of abode of the attorney or attorneys to whom he was articulated," and therefore no person who had not served with an attorney could be admitted at law, he declined to decide the point, and referred the applicant to the court. It will be seen that the only difference between the two cases is this, that in the first case the applicant had been re-admitted in Chancery, whilst in the other instance the application was made on an original admission in Chancery. We think it probable that on further consideration the latter decision will be applied to the case of a re-admission in Chancery.

Would you oblige me by informing me in your next, or earliest convenient number of the *Law Chronicle*, whether, if after being admitted an attorney or solicitor, I must take out a certificate within any limited time, or whether I can at any distance of time take out a certificate without any extra formalities.

J. C. O.

A certificate should be taken out within twelve months after admission, otherwise the party will have to give notice of an application for a grant of a certificate under the Rule of Hilary Term, 1853.

ASSISTANT JUDGE OF MIDDLESEX SESSIONS.—Now that Serjeant Adams is passed out of this world, those critics who were continually abusing him can find it in their hearts to award him a meed of praise, and indeed, to do them justice, they have rather overshot their mark, perhaps, with a view to wipe off old scores. His office became a subject of keen competition among those who had magisterial influence, but rather unexpectedly the choice has fallen on Mr. Pashley, Q. C. who earned a well deserved representation in bastardy and poor law cases until an extinguisher was put on such litigation.

ARTICLED CLERKS AND THE EXAMINATIONS.

THERE is some very useful matter in the Minutes of Evidence taken before the commissioners for inquiring into the Revenues of the Inns of Court relating to Articled Clerks and the Examinations, and also incidentally respecting the status of solicitors, which will, we think, be acceptable to our readers. It was furnished in the course of the examination of two solicitors, Messrs. Keith Barnes and W. Strickland Cookson, who being connected with, being, indeed, members of the council, also attended the commissioners on the part of the Law Institution.

MR. COOKSON'S EVIDENCE.

Establishment and mode of conducting the examination.—The subject of legal education, in our own branch of the profession, has been for a long time under our consideration. When the solicitors established the institution of the Incorporated Law Society, they presented a memorial to the judges, submitting that in their opinion, a great advantage would result to their branch of the profession if a system of examinations of candidates for admission on the Roll of Attorneys were established. The judges acquiesced in that view, and eventually certain regulations were made. That was as far back as the year 1835, that is to say, in May, 1835, the memorial was presented to the judges, and in Trinity Term, 1836, the examinations commenced. We believe that great advantage has resulted from those examinations. The mode in which the examinations are conducted is this:—There are four solicitors, who are examiners for each term, and a master of one of the courts of common law. Fifteen questions upon each branch of the law are prepared and printed. The candidates, on the day of the examination, are all assembled together in the hall of the institution, and the questions are then submitted to them, and their answers, which are written, are carefully examined by the examiners, and such men as have shown themselves sufficiently acquainted with the different subjects are certified to be proper men to be admitted attorneys.

Appeal to the judges.—There is a right of appeal to the judges against the rejection of candidates by the examiners; and a few instances have occurred of such appeals, but the judges have always confirmed the decisions of the examiners.

Diminution of applicants for admission.—I find that previous to the commencement of the system of examination in Trinity Term, 1836, the average number of Attorneys annually admitted on the Rolls was between 500 and 600, and the number

annually admitted in 16 subsequent years, from 1837 to 1852 inclusive, averaged about 391 annually. There was a falling off in number after the examinations commenced, and the examinations probably operated to prevent, to some extent, the application for admission by young men who during their clerkships had not applied themselves industriously to the study and practice of the law; but I think that about this time an apprehension began to prevail that the reforms then in contemplation in the practice of the law would materially diminish the emoluments of solicitors, and that many gentlemen were thereby deterred from incurring the expense of placing their sons in the profession.

Lectures for students.—We (i.e., the Law Institution) afford to the student the opportunity of deriving instruction from lectures. The lectures commenced in the year 1833, about three years before the examinations were established. We have lectures on subjects connected with three branches of the law, namely, common law, equity, and conveyancing. The lectures are delivered twice a week, commencing in November in each year. I believe great advantage has resulted to the students who have attended the lectures. I have had opportunities of knowing, from my own observation, that those who have attended the lectures have derived great benefit from them.

Examinations beneficial.—The system of examination has been very beneficial to our branch of the profession; it has stimulated young men to reading during their clerkship, and they come into the profession better prepared than they would otherwise be to discharge their duty as attorneys, and are better acquainted with legal principles.

Equity, common law, and conveyancing, indispensable branches.—Those who are admitted have a considerable acquaintance with common law, with conveyancing, and with equity; they must pass in all the three branches. The Master of the Rolls, when he appointed us to examine the applicants for admission to the Roll of solicitors in equity, required that we should not grant a certificate to any applicant who did not pass the equity examination, though he might be qualified in other branches. The common law judges made common law a *sine qua non*; and within the last two or three years, feeling the great importance of solicitors being well skilled in conveyancing, we have induced the judges to allow us to make that also a *sine qua non*.

The rejected.—Do you reject any candidates? Some are postponed every Term.—Do they present themselves again after a certain time? They do.—And occasionally pass after their first rejection? Yes. [It would appear by these questions and answers that some of the unfortunate rejected have

not the courage to make a further attempt, but we should think the number cannot be large].

Preliminary examination in general literature.—The subject of an examination in general literature has been under the consideration of the council, and a committee was appointed to consider the subject, and that committee, of which I was a member, made a report to the council, pointing out the advantages of having an examination in general literature *previously to their being articulated*, and proposing one in Classics, Mathematics, and Ethics, in the French language, and English history. The council received the report favourably, but thought some modifications desirable, and the report was referred back to the committee. Hitherto the council have not come to any final decision. There is a considerable difference of opinion in the council, but I think a majority are in favour of an examination.

Certificate as to moral character—Inquiries as to.—Every gentleman applying to be admitted must bring a certificate from the solicitor with whom he has served, that he has diligently and faithfully employed himself during clerkship; to his moral character the master also certifies. Instances have occurred where in consequence of representations made to them, the examiners have felt it to be their duty to make strict inquiry into the moral conduct of candidates with reference to particular transactions.

Lectures in Inns of Chancery—Establishment of law institutions.—There is a formal proceeding, or was until within a year or two, of a reader being sent from the Temple to one of the inns of Chancery; but he found no students to lecture to. Being excluded from the inns of court, and their libraries, our branch of the profession felt it very important that other facilities should be afforded to young men of studying their profession, and with a view to having a hall, and library and lectures, this institution of ours was established by the solicitors, at an expense to themselves of upwards of £90,000, and they have contributed annually large sums to its support. We have a large library, which has cost us a large sum of money. We pay the lecturers from our funds, receiving a small sum from the students who attend. A very large proportion of our members personally derive no advantage from the hall or from the institution, but they have contributed largely to the erection of the building and the purchase of the library, and they continue to contribute annually to the institution, from a conviction that the institution is a valuable one to the profession. Though performing extremely useful functions, we are in fact a voluntary society. We have felt that if there are any funds either connected with the inns of court or the inns of Chancery, which could be fairly applied to the purposes of legal educa-

tion, the claims of our society, and of our branch of the profession, should be considered. We have lost all the advantages connected with the inns of court; we are no longer connected with them. I am quite ignorant as to the fact whether there are any such funds or not; but if there are such, we certainly should ask to have our claims considered. I believe our institution has been of very great value to the profession and the public.

Cost of the education of an attorney.—As to the cost of the education of an attorney, I think in London the fee paid to a solicitor on a clerk being articulated is 300 guineas; the stamp upon the articles was, till last year, 120 guineas; it is now reduced to 80 guineas. He has to serve five years; he mixes among gentlemen, and must support the position of a gentleman, which is a considerable expense. When he has served five years he has to be admitted. There is a stamp upon the admission, which is £25, and there are some other fees connected with his admission. Some small fees also are paid upon the examination. He also contributes something to the lectures. That would make altogether more than £1,000. Many gentlemen, after they have served their clerkship, incur the further expense of going into the chambers of a conveyancing barrister, or a special pleader, for six or twelve months. In fact, the necessary cost of the education for an attorney, is considerably larger than that of a barrister. Besides paying for the stamp on his articles, and the stamp on admission, the solicitor has to pay an annual certificate duty. With respect to the expense incurred by a solicitor we have always felt it to be a great grievance in our branch of our profession, that we had a treble taxation, which I believe no other class of men in the kingdom are subject to. A tax of £120, upon being permitted to enter the profession at first, a stamp of £25, upon our admission, and when we had paid both those, we were not permitted to practice without an annual certificate, which used to cost us £12, but is now, reduced to £9. The object of requiring the stamp on articles was, I believe, declared by Mr. Pitt to be to increase the respectability of the profession; and when we had an interview some little time ago with the Chancellor of the Exchequer, we submitted to him that a much better means of improving the character of the profession would be to have the money that is now paid for stamp duty upon the articles expended upon the previous education of the clerk.

Attorneys have risen in public estimation.—The profession of an attorney has very much risen in importance and respectability compared with what it was 200 years ago, but I can hardly imagine that the public could, at any period, have got on without

the assistance of intelligent, well-informed professional men in the position of solicitors.

Duties of attorneys and barristers distinct—Attorney never a mere clerk.—I think the duties of the barrister and the solicitor are tolerably distinct. I am not aware that at any period the attorney was a mere clerk. As far back as the 20th Henry III. (1235) a statute was passed (c. 10) empowering suitors "to freely make his attorney to do those suits for him;" and by the statute of 15 Edward II., c. 1 (1322), there was reserved "to the chancellor for the time being his authority in admitting attorneys, according to whose discretion they shall be admitted, and to our chief justices, as heretofore hath been observed in the admission of attorneys." Again the statute 4th Henry IV., c. 18 (1403) alluding to mischiefs arising from attorneys "ignorant and not learned in the law as they were wont to be before this time," ordained and established "that all the attorneys shall be examined by the justices, and by their discretions their names put in the roll, and they that be good and virtuous and of good fame shall be received and sworn well and truly to serve in their offices." "And if any of the said attorneys do die or do cease, the justices for the time being by their discretion shall make another in his place which is a virtuous man and learned." And in 1632 a rule was made by the court of King's Bench that "none hereafter shall be admitted to be an attorney of this court unless he have served a clerk or attorney of this court by the space of six years at the least, or such as for their education and study in the law shall be approved of by the justices of this court to be of good sufficiency, and every of them admitted of one of the Inns of court or Chancery." In 1654 there was another rule "that all officers and attorneys of the court be admitted of some inn of court or Chancery, by the beginning of Hilary Term next, or in the same Term wherein they are admitted officers or attorneys; and be in commons one week in every Term, and take chambers there, or in case that cannot be conveniently, yet to take chambers or dwellings in some convenient place, and leave notice with the butler where their chambers or habitations are, under pain of being put out of the roll of attorneys." It appears that at an early period the body was an important body, so important that the legislature and the judges considered it necessary to make very stringent regulations in reference to their qualifications.

Town and country articulated clerks—Proportion attending lectures.—I have stated the average number of attorneys annually admitted from 1837 to 1852 inclusive to be about 391. The following table shows the number of articulated clerks who have attended the lectures from the commencement

in 1833 to the end of the Session 1853-4. The average number is 205, and it is to be borne in mind that of the numbers annually admitted on the Roll of attorneys about seven-tenths have served their clerkships in the country, and a great many of those come up to town to be examined and admitted, and have no opportunity of attending the lectures.

In the year	1833-4	...	...	...	326
"	1834-5	...	...	...	228
"	1835-6	...	...	...	193
"	1836-7	...	...	...	242
"	1837-8	...	...	...	240
"	1838-9	...	...	...	229
"	1839-40	...	...	...	205
"	1840-1	...	...	...	181
"	1841-2	...	...	...	155
"	1842-3	...	...	...	198
"	1843-4	...	...	...	206
"	1844-5	...	...	...	177
"	1845-6	...	...	...	169
"	1846-7	...	...	...	201
"	1847-8	...	...	...	199
"	1848-9	...	...	...	173
"	1849-50	...	...	...	186
"	1850-1	...	...	...	194
"	1851-2	...	...	...	195
"	1852-3	...	...	...	207
"	1853-4	...	...	...	206

Articled clerks having taken degrees—Their alleged superiority.—I may be permitted to state that those who have taken the degree of bachelor of arts at one of the universities are entitled to admission after a service of three years' clerkship. I have in several instances, where friends of mine have consulted me about their sons, recommended that they should graduate at one of the universities before being articulated, and as examiner, I have had an opportunity of seeing how B. A.'s come out of our examination, and the result has been very satisfactory. Some of the best examinations have been of men who have taken the degree of B. A., and applied to be examined at the end of three years, so that they had done more in three years than others had done in five. [It would have been more satisfactory if a comparative list could have been furnished of the number of candidates who had taken degrees, and of the number of them compared with non-graduates who passed a good examination].

MR. BARNES' EVIDENCE.

Preliminary examination—Medals—Alphabetical lists.—I am decidedly in favour of a preliminary examination. Some difficulties would attend the practical working of it, but I think that they can

be obviated. I may add, that many members of the council of our law society who, *ex officio*, are appointed examiners under the present system, are desirous that the merits of the several candidates who distinguish themselves in the examination should be tested and recognised by marks of honour, as for instance, a medal for the most successful, and an alphabetical class for those who distinguish themselves above the ordinary run of others, who may yet be entitled to the certificate of fitness. An impression prevails amongst some of the examiners that the judges might not approve of it, but in the present day I rather anticipate the contrary.

Difference between education and attainment of barristers and attorneys—Distinct branches desirable.—I consider that the education required for the one branch of the profession is to some extent of a different character from that required for the other branch. The barrister ought to have a profound knowledge of the particular branch of the law to which he devotes himself, whether it be common law, equity, or conveyancing, whilst the attorney should have a general knowledge of the law as administered in all those branches, and of the application of the law to the various circumstances in which his advice will be sought by his clients in the course of his professional practice. The barrister practising in the courts of common law is not consulted upon a question of equity or conveyancing, nor is he expected to be able to give advice upon it; but the attorney must be prepared to give advice and to transact business in common law, equity, or conveyancing. The most eminent and successful barrister will be he who has the greatest number of clients litigating their cases in court, whilst the attorney, who with an extensive practice gives that advice which prevents his clients from going to law, and so tries or defends very few actions in court, as compared with the extent of his practice, will be the safest adviser, and will best perform his duty to his clients and to society. The two branches of the profession always have been, and in my opinion ought to remain, distinct. I think the practice of a barrister and of a solicitor is quite sufficiently distinct to constitute two branches of the profession. If a client has to consult his solicitor, the circumstances of that solicitor being a very highly educated man, a well-informed man on the subject of the law, is really a saving of expense to the client. He would often be able to give him an opinion which would render it unnecessary for counsel to be consulted, and where it might be necessary to consult counsel, a skilful, well-educated solicitor, a man who thoroughly understands his business, would be able to present the subject more

clearly, fully, and satisfactorily to the barrister. A solicitor, however highly educated, is only permitted to make certain specified charges which the humblest practitioner is also entitled to make.

CERTIFICATED CONVEYANCERS.

THERE are some very proper remarks in a contemporary, respecting certificated conveyancers to which we draw the attention of our readers, remarking, however, that this class of practitioners is in not at all good odour with the bar, who would be pleased to see certificated conveyancers annihilated, they being quite as injurious to the bar as to solicitors, and there being the additional fact that solicitors often patronise them, and so furnish the means by which an unjust encroachment is made on the proper function of solicitors, and with which the members of the bar are certainly most unwilling to interfere. "There are, it seems, but few if any equity draftsmen; but the special pleaders are somewhat numerous, and this class of lawyers are generally very learned and useful in their vocation. There might be no objection to the certificate: conveyancers, if they would confine themselves (as we believe the benchers intend) to prepare drafts of deeds and instruments, and advising on points of conveyancing practice, and some of them honourably do so; but the majority carry through the whole transaction,—charging for negotiating loans and other contracts, and for correspondence, attendances, copying, and ingrossing deeds, &c. Where any part of the business requires proceedings in the courts of law or equity, they call in the services of an attorney, and it is more than suspected that on many occasions they illegally participate in the attorney's emoluments. Some time ago there was a sort of partnership between an attorney and a certificated conveyancer, and the court of Queen's Bench ordered the attorney to be struck off the Roll, and the certificated conveyancer to be committed to prison (In re Jackson and Wood, 1 B. and Cr. 270). Considering the numerous changes which have taken place to the great pecuniary loss of attorneys and solicitors, it is but just that encroachments on their legitimate and accustomed practice should be strictly prohibited. It is not only just, but for the sake of the community, it is *politic* that the rights and privileges of the profession should be protected, in order that a responsible and educated body of men should be induced to practise as attorneys and solicitors—otherwise their business will fall into needy, unworthy, and incompetent hands."

GIFTS BY CLIENTS TO SOLICITORS.

WE have seen (vol. 1, p. 89) that courts of equity do not look with so much jealousy on the transaction by which a solicitor takes a benefit under the will of a client as on gifts *inter vivos*, and we have before (*ante*, p. 49) referred to the decision of V. C. Kindersley in the case of *Tompson v. Judge*, 1 Jur. N. S. 583, but as the matter is one of great importance to the profession, we avail ourselves of a report of the judgment in one of the regular reports, viz., 3 Drewry, 306. The solicitor who was the defendant in the suit was the professional adviser of a Mr. Chamberlayne, who it appeared entertained sentiments of private regard and friendship for him, independently of his confidence in and employment of him as his solicitor. By a deed dated July 2, 1851, Mr. Chamberlayne conveyed to Mr. Judge certain real estate expressed to be in consideration of £100 for the purchase money, and containing the usual acknowledgment of, and discharge for the purchase money, and covenants for title, and a receipt for the purchase money was indorsed on the deed in the usual way. The only evidence exclusive of the deed itself, was that of the defendant who stated that in June 1851 the deceased had expressed his intention of giving him two freehold closes of greater value than that comprised in the conveyance, and had instructed him to prepare a will for the purpose, and that he had accordingly prepared and laid before him a draft will; that he afterwards altered his intention and desired him to make him a gift by deed, and that the deed in question was prepared and executed accordingly; that it was not and never was intended as a purchase but as a gift, and that the consideration was merely nominal; that no money ever passed or was intended to pass, and that the consideration of £100 was introduced to save stamp duty, which would have been somewhat higher on a deed of gift. The value of the property was admitted to be at least £1,200, and that the defendant prepared the deed, and that it was executed by the deceased without consulting any other solicitor. In the administration of Mr. Chamberlayne's estate, the validity of this deed was questioned. In his judgment Vice-Chancellor Kindersley said:—"As to the cases of purchases by solicitors from their clients, there is no rule of this court to the effect that a solicitor cannot make such a purchase (*see ante*, p. 49). A solicitor can purchase his client's property, even while the relation subsists; but the rule of the court is, that such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair; that the client knew what he was doing, and in particular that a fair

price was given, and, of course, that no kind of advantage was taken by the solicitor. If the solicitor shows that the transaction was fair and clear, there is no difference between a purchase by him and by a stranger. That is the rule of the court as to purchases. Is the rule with regard to gifts precisely the same, or is it more stringent? Less stringent it cannot be. There is this obvious distinction between a gift and a purchase. In the case of a purchase the parties are at arm's length, and each party requires from the other the full value of that which he gives in return. In the case of a gift the matter is totally different, and it appears to me that there is a far stricter rule established in this court with regard to gifts than with regard to purchases, and that the rule of this court makes such transactions, that is, of a gift from the client to the solicitor, absolutely invalid. To this distinction Lord Justice Turner refers, in *Holman v. Loynes* (18 Jur. 845), when he says, 'The rules against gifts are absolute, and against purchasers they are modified.' There are numerous cases in which it appears to me that the court has supported that rule. The first is *Welles v. Middleton* (1 Cox, 112), that was a case of gift. There Lord Thurlow expressed himself thus:—"In the case of attorneys, it is perfectly well settled that an attorney cannot take a gift, while the client is in his hands, and there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it was not so." In *Hatch v. Hatch* (9 Ves. 292), a case of gift, Lord Eldon expresses himself thus:—"This case proves the wisdom of the court, in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand purporting to be bounty for the execution of antecedent duty." In *Morse v. Royal* (12 Ves. 355), Lord Erskine expresses himself to the same effect. So in *Lady Ormonde v. Hutchinson* (13 Ves. 47), and in ——— *v. Downes* (18 Ves. 127), Lord Eldon commenting on the cases between attorney and client, says, 'The case of *Welles v. Middleton* is an extremely strong case of this kind. The transaction was overturned upon the great principle,—the danger from the influence of attorneys or counsel over their clients, while having the care of their property; and whatever mischief may arise in particular cases, the law with the view of preventing public mischief, says they shall take no benefit derived under such circumstances.' In another case of *Montesquieu v. Sandys* (18 Ves. 302), he expresses himself thus:—"This is not a gift or reward to an attorney taken by him beyond the amount of his bill for service done; not, therefore within those cases which have wisely established a prin-

ciple that would reach the transaction had it been admitted or proved that the defendant took this conveyance before his bill was delivered as a reward for service done as attorney, viz., that an attorney shall not take from his client a gift or reward while standing in that relation; the connection between them subsisting with the influences attending it, though the transaction may be as righteous as ever was carried on.' I think that those cases are sufficient to show that in the opinion of Lord Thurlow, Lord Erskine, and Lord Eldon, the view of this court is, that the rule with regard to gifts is absolute, that is, it is not open to the attorney to show that the transaction was fair; but that the gift cannot stand. In the case of *Harris v. Tremehere* (15 Ves. 34), in which Lord Eldon is said to have upheld a transaction of gift, that was a bill to set aside several transactions, some of which Lord Eldon supported, dismissing the bill on the ground that there was a third party whom the client intended to benefit. Another portion of the case consisted of a purchase by the solicitor from the client. The third class was of pure gifts, and Lord Eldon dismissed the bill as to those. I am at a loss to understand the ground of the decision. It may have been upon some circumstances which were not stated. It may have been that Lord Eldon was at the time under a misapprehension of the rule. If that were the only case on which Lord Eldon had expressed his opinion, I should feel great difficulty; but when I find that in *Hatch v. Hatch* he lays down the rule in the terms I have mentioned, and that in a subsequent case he also lays it down in the same way, I must conclude that in Lord Eldon's mind the rule was considered to be as it is stated in *Welles v. Middleton*. I am, therefore, of opinion that according to the rule of this court, a solicitor cannot, while the relation subsists, while, to use the language of Lord Thurlow, the 'client is or may be under the crushing influence of the solicitor,' by way of gift take a benefit. Now, of course, a difficulty may arise as to what amounts to a cessation of the relation between the parties, so as to remove the rule; whether it is necessary that in all respects the relation should have ceased, or whether it is sufficient that it should have ceased in *hac re* only. But it appears to me that it is unnecessary here to consider that, for here there is no pretence, but that the relation of solicitor and client, which subsisted for years before the transaction, continued to subsist throughout it, and down to the death of the testator, and that in the transaction itself, in the preparing of the deed, Judge was himself the solicitor of Chamberlayne. I am of opinion that if the matter stood thus:—if the deed had been in consideration of obligations by the client to Judge,

or in consideration of a desire to benefit him, and the deed had expressly and clearly stated it to be for those considerations,—it could not stand. But it does not rest there. If the rule were, as to gifts, less stringent than it is, if it were no higher than it is as to purchasers, still one thing is clear, that in any such transaction the instrument must express clearly on the face of it the whole of the circumstances. It is not necessary for me to go into the general doctrine as to the question how far it is competent for a party, claiming under an instrument representing a certain consideration, to be allowed to prove a different consideration. It is sufficient to say, that beyond all doubt, in a transaction between attorney and client, it is not competent for the attorney to set up a different consideration from that appearing on the instrument. Now, this instrument, when produced, and there is no evidence to contradict it but that of the defendant himself, is expressed to be in consideration of £100, stated to be paid at the time, and the receipt is acknowledged. The defendant says, all that is fictitious; that the consideration was good will and kindness. Beyond all question, when a deed between attorney and client is expressed to be for one consideration, it is not competent to the attorney to alter it. In this case it is not disputed that, if this is a purchase, it cannot stand. The defendant admits the property was bought for £1,200. There is some evidence to show it is worth £2,000, and the purchase-money is £100. It is clear that as a purchase it cannot stand. I am of opinion, on the whole, that this transaction cannot stand. If it were merely a question whether the defendant had acted with perfect delicacy, this court could not judge. But it is a case in which Judge takes a gift, as he alleges, from his client, not only while the general relation of solicitor and client subsists, but while he was acting as solicitor in the very transaction; and more than that, a case in which he has taken under an instrument in which he misstates the transaction. Judge must, therefore, be declared a trustee for the plaintiff."

MEDICAL JURISPRUDENCE — POISONS AND POISONING.

As cases of poisoning are now so frequent, and no little interest has lately been excited, and is likely to continue in some of these cases, our readers may not be displeased with a short account of poisons and some remarkable cases of poisoning, which we have taken from one of the early volumes of the "Law Magazine," which was then a publication of great utility, and also of some interest.

The art of poisoning, in all ages of the world, has

been chiefly indebted to the female sex for its scientific cultivation; not, as some writers basely insinuate, on account of the superior malevolence of the fairest portion of creation, but doubtless because their inferior physical strength has compelled the evilly disposed among them to pursue those means of malice or revenge, which involve no risk of personal conflict. The name of Locusta will go down to posterity, immortalised by Tacitus and Juvenal; few persons were more celebrated than Spars during the pontificate of Alexander the 7th; and Tophana could boast upon the rack of having destroyed above six hundred persons at Naples and Palermo. She had even the rare honour of giving her name to the poisons she employed, the Aqua Toffana, or della Toffana, which she sold in small glass phials, as the manna of St. Nicholas of Bari; though, being a woman of singular benevolence, she distributed it gratis to such wives as wished for other husbands. But Margaret d'Aubray, Marquise de Brinvillier, was perhaps without a rival in this practice. Her victims were selected from her nearest kindred, or sought for among those already suffering from the pangs of poverty and sickness. She saw in the confidence of parental affection only a facility for destroying life without suspicion, and employed the semblance of charity as a cloak for experimental murder. She seems to have moved in an atmosphere of poison. The daily food of her father and brethren, the bread she distributed to the indigent, the draught she held to the lips of the diseased, were tempered with the same infernal art. But the history of her exploits, and her detection on the death of her lover and tutor St. Croix (the prototype of Alasco in Sir Walter's *Kennilworth*), are too irrelevant to admit of longer dwelling on them.

Poisons may be variously introduced into the system; by inhalation through the nostrils, by inspiration through the lungs, by injection, by absorption through the skin, and, lastly and most commonly, in the form of food. All methods except the last are very rare and difficult to effect, although they formed a subject of much silly speculation in the imperfect state of medical science centuries ago. The absurd scheme for destroying Queen Elizabeth by poisoning her saddle, and the anointed chair intended for the Earl of Essex, are probably in the recollection of the reader (See Aikin's *Mem. of the Elizabeth*, vol. i. p. 844; vol. ii. p. 353). The wearing of a venomed boot or glove, the reading of a letter, the smelling of a nosegay, were long believed sufficient to produce death; and one writer (quoted by Dr. Beck) asserts that Pope Clement VII. was poisoned by the smoke of a candle. On these narratives, too, it is unnecessary to expatiate; we merely mention them for the satisfaction of the curious.

The classification of poisons is not difficult. The natural historian will divide them as they chance to bear relation to the mineral, vegetable, or animal kingdom, and we shall be enabled very nearly to preserve these distinctions, although it is incumbent rather on the medical jurist to treat of them pathologically, or according to their peculiar action upon the living system. Regarding, then, the characteristics of the process by which these substances destroy life, we may distinguish six classes, as follows:—The corrosive or escharotic; astringent; acrid or rubefacient; the narcotic or stupefying; narcotico acrid; septic or putrefying. Now it will be found that all mineral poisons are included under the two first heads; that the 3rd, 4th, and 5th belong to vegetable only, and that the last is confined to animal poisons. Two vegetable compounds, the oxalic and tartaric acids, must, however, be classed as corrosive or escharotic. In the consideration of each class, it will be necessary to enumerate the evidences by which their effects are detected and distinguished from natural disease in the living or dead subject, and to shew to what questions the difficulty of so doing has given rise in courts of justice.

The ordinary systems by which the victim discovers that he has swallowed a corrosive poison (what are corrosive will be presently explained) are, first, an extraordinary taste in the food or drink which has been its vehicle; then, a heat, irritation or sudden dryness at the root of the mouth and gullet, attended with a constriction or sense of strangling, afterwards great anxiety to vomit, and sharp pains in the stomach and intestines, and, finally, intense thirst, copious discharges by vomiting and stool, succeeded by hiccup; great pain in the region of the kidneys with strangury, convulsions, cramps of the hands, trembling of the lips, enfeebling of the voice, repeated faintings, cold sweats, and a small wiry irregular pulse. It is observed, too, in these cases, that the intellectual faculties remain perfect until a short time before death, when the patient falls into a state of insensibility. Further, it is a curious characteristic of these poisons that a small quantity administered proves more generally fatal than a large one, as the latter generally produces vomiting so violent and immediate, that the whole is rejected from the stomach before great internal injury has supervened. Two drachms of tartar emetic failed to destroy life in a female mentioned by Deschamps, whilst another succeeded in despatching herself by swallowing only eleven grains. In like manner a very minute portion of arsenic will almost always prove fatal: whereas Dr. Beck mentions a case at Boston in 1817, of one George Beats, who, with intent to

commit suicide, swallowed an ounce and a half of that mineral after a hearty supper of beefsteaks, but being seized with vomiting, he recovered his usual health in three or four days.

In the celebrated case of Miss Burns, the appearances were certainly dubious; on that account a notice of it under this head may not be misplaced, although the poison, if any was employed there, was probably more of the aerid than the corrosive class. It is unnecessary to enter at large into the rather disgusting details of this trial, in which there were strong suspicions of illegally procured abortion as well as murder. We merely give the account, as it appeared in evidence, of the remarkable peculiarities observed on dissection of the body.

Margaret Burns resided as governess in the family of Mr. Charles Angus, a widower, with two or three children. On Wednesday morning, the 23rd of March, 1808, she was apparently in her usual state of health, but was soon after attacked with violent pains and sickness. These continued with little intermission until ten o'clock on Friday, when she was found dead in the corner of the parlour, where she had remained throughout her illness, constantly attended by Mr. Angus, who was discovered sleeping very soundly, when the witness entered the room and perceived Miss Burns lying lifeless on the ground, "cowered of a lump," her elbows on her knees, and one foot "crudled" under her. On Sunday following, a dissection took place, by order of the coroner. No marks of external violence were discovered on the body, nor was there any appearance of commencing putrefaction. The nails of the fingers were of a bluish colour; and the veins on the external surface of the abdomen much enlarged. On opening it, a considerable quantity of thin yellowish fluid was found to have been effused into that cavity, more turbid, but similar in colour and smell to some that poured out at the nostrils. Marks of inflammation were found on the external coat of different portions of the small, but not of the large intestines. The external coat of a part of the smaller curvature of the stomach was also inflamed, and a similar appearance was partially seen on the anterior edge of the liver. On raising up the stomach, an opening through its coats was found, in the anterior and inferior part of its great curvature; and from this opening, a considerable quantity of a thick fluid, of a dark olive colour, issued. Some ounces were collected and preserved. *The natural structure of the coats of the stomach, for a considerable space round, was destroyed; and they were so soft, pulpy, and tender, that they tore with the slightest touch.* Around this part of the coats of the stomach, there were no traces of inflammation. The stomach was then taken out of the body, the

inner surface carefully washed, the contents washed out, and preserved. The several fluids thus removed were subjected to various chemical tests, but without any result at all indicating the presence of poison. Further, the appearances of the womb were such as might have been expected a few hours after the birth of a child nearly full grown.

On these and some other less important grounds, coupled with the known fact, that improper familiarities had been noticed between Mr. Angus and the deceased for some time previous to her death, a suspicion was excited against him that he had endeavoured to procure a premature delivery or abortion, and had administered or been privy to the administration of certain drugs, which in the end had produced her death. After a trial, however, which lasted nineteen hours, Mr. Angus was acquitted. The medical witnesses for the Crown contended that the state of the stomach upon dissection warranted a suspicion of poison. Dr. Carson, on the other hand, who had examined the body, contended that such appearances were to be reconciled by the supposition, that the action of the gastric fluid after death had caused the dissolution of the coats. This and the rest of his evidence, in the opinion of Dr. Paris, "savoured more of the ingenuity of the forensic pleader, than the justice of the honest inquirer after truth."

The chemical tests by which the presence of arsenic may be detected are very numerous, and of course of the highest importance, as the analysis of the contents of the stomach after death is often the only mode by which murder can be clearly proved. In the use of these extreme nicety is always indispensable. The most valuable are, lime-water, which gives with arsenic a fine white precipitate of arsenite of lime; ammoniacet of copper, which in a state of saturated solution will give a green colour with a solution of the white oxide of arsenic; sulphate of copper, well dissolved, which joined with the same quantity of the potash of commerce, and a less of arsenic also in solution, gives a beautiful grass green precipitate, forming when dried the paint called Scheele's green, and this is perhaps the best of all tests; also the solution of sulphuretted hydrogen in water, which throws down the arsenic in a precipitate of golden yellow. There are various other tests, of which the best view is afforded by the evidence of Dr. Addington, given on the trial of Miss Blandy nearly 80 years ago.

Mary Blandy was tried at Oxford for the murder of her father in the year 1752. She had formed an attachment, of which her parent disapproved, for one Captain Cranetown. This wretch finding no other way of gaining possession of his mistress and her property, prevailed on her to attempt the poisoning

of the old man with some arsenic, which he furnished to her for that purpose. She was accordingly induced from time to time to mix it in her father's food and drink. The health of the unhappy victim gradually sank under this dreadful regimen; his days were passed in continual agony, and at length after swallowing a rather larger dose than usual in some gruel, his sufferings were terminated by death. The usual evidences of poisons were found upon dissection. A portion of some powder discovered at the bottom of the gruel was given to Dr. Addington for examination. He pronounced it to be white arsenic, and stated upon the trial his reasons as follows.

"1. This powder has a milky whiteness; so has white arsenic. 2. This is gritty and almost insipid; so is white arsenic. 3. Part of it swims on the surface of cold water like a pale sulphurous film; but the greatest part sinks to the bottom and remains there undissolved; the same is true of white arsenic. 4. This thrown on red hot iron does not flame, but rises entirely in thick white fumes, which have the stench of garlic, and cover cold iron, held just over them, with white flowers; white arsenic does the same. 5. I boiled ten grains of this powder in four ounces of clear water, and then passing the decoction through a filter, dividing it into five equal parts, which were put into as many glasses. Into one glass I poured a few drops of spirits of sal-ammoniac; into another some of the lixivium of tartar; into the third, some strong spirit of vitriol; into the fourth, some spirit of salt; and into the last some syrup of violets. The spirit of sal-ammoniac threw down a few particles of pale sediment; the lixivium of tartar gave a white cloud, which hung a little above the middle of the glass; the spirits of vitriol and salt made a considerable precipitation of a lightish coloured substance which in the former hardened into glittering crystals, sticking to the sides and bottom of the glass; the syrup of violets produced a beautiful green tincture. I pursued precisely the same course with ten grains of white arsenic which I purchased. There was an exact similitude between the experiments made on the two decoctions. They corresponded so nicely on each trial, that I declare I never saw any two things in nature more alike than the decoction made with the powder in Mr. Blandy's gruel, and that made with white arsenic. From these experiments and others which I am ready to produce, if desired, I believe that powder to be white arsenic."

Miss Blandy was condemned and executed, denying to the last any knowledge of a noxious quality in the powder she gave to her father.

There are cases, where the application of chemical tests have entirely failed to demonstrate the presence

of arsenic among the contents of the stomach, although death was unquestionably occasioned by it. In such a difficulty the medical examiner will generally be enabled to form a just opinion from symptoms before and after death, as in the instance of the Mitchell family, which occurred but a few years ago.

On Sunday the 19th of August, four persons of the name of Mitchell, of whom the eldest was fifty-two, and the youngest, William, a robust man of forty-five, partook together of a plentiful breakfast, on porridge, consisting of milk, salt and meal. The largest quantity was eaten by William, who shortly afterwards was attacked with sickness, thirst and head-ache, and, on his return home from church, with vomiting, which lasted for the next four or five days. In the early part of the week, he was heard to complain of pain in his stomach, eyes, throat, breast and arms, he was observed to void his urine frequently, and about this time he pointed out to one of his sisters a hollow between his breast and belly, into which according to her expression "she could have laid her arm."

It is unnecessary to enter into all the particulars of this case. William Mitchell expired about a week after his first attack, having throughout suffered more or less from the above-mentioned causes, but never feeling sufficiently ill to confine himself to his bed. The body when opened, presented indisputable proofs of poisoning, but the minutest examination of the fluids contained, *failed to detect any poisonous ingredients*. The other three who had partaken of the porridge recovered, although attacked at first with the same symptoms.

The brother-in-law of the family, was tried in October before the Judiciary Court of Aberdeen for administering poison to his relatives. He subsequently confessed that he perpetrated the crime with arsenic put among the salt on the Sunday morning the family were taken ill.

We cannot quit this subject without relating a story strongly illustrative of that philosophic ingenuity which is indispensable to the solution of many questions in medical jurisprudence. It is thus told by Dr. Beck.

In the month of May, 1711, four individuals, viz., a priest, two females, one of whom was his sister-in-law, and another person, all in good health, and on a journey, stopped at an inn to dine. They proceeded on their journey after taking this meal, but in a short time the priest was seized with such violent pain as to oblige him to dismount from his horse, copious evacuations by vomiting and stool succeeded, and his illness increased so rapidly, that it was found necessary to take him back to Asenne, the place where they had dined. A physician was called in, who conceiving the complaint to be an

ordinary choleric, treated it with fomentations, glysters, purgatives and anodynes. During this time, one of the females was seized with severe pain and weakness, accompanied with copious evacuation. The fourth person of the party also complained of pain and weight in the stomach; but notwithstanding this, the physician had no suspicion of poison, since the other female was in perfect health, and the landlord protested that there could have been nothing noxious in his dishes. On the next day they were all somewhat better, and were enabled to arrive at a place near where Morgagni resided, for whom they immediately sent. This great physician having learned the circumstances, immediately enquired whether there was not some dish on the table, of which the female in good health had not eaten. He was answered in the affirmative, and it was ascertained to have been a large dish of rice served up at first. He settled in his own mind that there were poisonous materials in this dish; but the difficulty was, why the priest who had eaten the least, should have suffered the most, while the female who had eaten a larger quantity was not so ill, and finally that the fourth person who had eaten more than all the rest, had only some pain in his stomach. "Was there not," said Morgagni, "some cheese grated over the rice?" They answered in the affirmative, and the priest, who had little or no appetite, ate scarcely any thing but the cheese; the female ate both cheese and rice, while the other person ate the rice with scarcely any cheese. "Then," said Morgagni, "the state of the case is, that the cheese was prepared with arsenic to kill rats, and not having been laid away with sufficient care, it was served up for your rice, while you were hurrying the landlord for your dinner." This opinion was verified by the confession of the landlord himself, who learning that the patients were out of danger, avowed that such was the cause of the accident.

Arsenic is the means of self-destruction very commonly employed. It is obvious that when death is caused by this or any other poison, the question of suicide or homicide must be decided by circumstantial evidence seldom or never connected with the researches of medical jurisprudence. We have not in poisoning, as in other modes of terminating life, a variation in the effect produced, dependent on the variation of the agency. The body will show no difference of state, the sufferings of the dying will be the same, whether A. poisons himself, or is poisoned by B. We are tempted, however, to make one quotation on this subject, valuable at least as a legal problem.

"Al sessions al Newgate post natalem Dom. 1604. 2 Jac. Le case fuit que en home et se feme ayant

long temps vive incontinent ensemble, le home ayant consume son substance et cressant en necessity, dit al feme que il fuit weary de son vie, et qu'il vouloit luy m'occider, a que la feme dit que donques el violoit aucimoryer ove luy: per que le home praya la feme que el voiluit vaar el acheter ratisbane, et ils voilont ceo leber ensemble, le quel el fist, et el ceo mist en le drink, et ils bibe ceo, mes la feme apres prest sallet oyle, per que el vomit et fuit recover, mes le home mourust: et le question fuit si deo fuit murthrer en la feme. *Montague recorder cause l'especial matter d'estre trove: quare la resolution*" (F. Moore, 754).

The most common preparation of which antimony forms the basis, is known by the name of tartar emetic. To prove fatal it must be swallowed in very large doses, and the instances of its occasioning death are so rare, that little notice need be taken of it as a poison. A case given by Becamier throws light on its attendant symptoms.

A man, aged 50, having resolved to poison himself, took on Saturday morning about forty grains of tartar emetic. Vomiting, frequent stools and convulsions, soon succeeded. He was received in the Hotel Dieu on Sunday evening. On Monday he complained of violent pains in the epigastric region, which was much distended. He could with difficulty, move his tongue, and was in a state of apparent inebriation: he just spoke, but his pulse was imperceptible. During the day the abdomen became inflated, and the epigastrium still more tumefied and painful. In the evening delirium came on. On Thursday all the symptoms had increased. He was furiously delirious, then convulsed, and died at night.

There are other mineral corrosive poisons that have often given occasion for inquiries important to medical jurisprudence. The concentrated acids, the most violent and speedy in their action, are instruments of murder almost unavailable, as they involve a certainty of detection; they have, however, been employed to effect suicide. Some substances, such as diamonds, glass, or enamel in powder, were long accounted deadly; but it is now pretty generally received, that all the injury they cause depends on their insolubility and mechanical properties. Yet scarcely twenty years ago, an unfortunate native of Bayeux was in imminent danger of condign punishment, on suspicion of poisoning his wife with pounded glass.

Louis Lavalley, such was his name, carried on for some time an amorous intimacy with Maria Guerin, the daughter of a neighbour. Her relatives, discovering her pregnancy, urged the necessity of marriage, to which the still ardent lover readily consented. It was, however, agreed that the parties

should live separate until the birth of the expected child. Soon after their union, Lavalley entertained his wife and father-in-law at dinner. They partook freely of roast pig, black pudding, and calf's liver. To these coffee succeeded, in which the bride mix some brandy. She returned home, and early the next morning was seized with violent pains and convulsions. Delivering with instruments was attempted, but the alarming hæmorrhage compelled the accoucheur to desist, and as death seemed inevitable the infant was extracted by the cesarian operation. She died during this, and her infant did not survive her.

The funeral took place as usual, but about a month afterwards the relations of the deceased having quarrelled with Lavalley and his friends, spread a report that he had poisoned his wife. The body was disinterred 42 days after death, and it was discovered on dissection that the intestines contained pounded glass. Lavalley was dragged to prison with every mark of opprobrium, and his life was saved only by the enlightened testimony of MM. Baudelocque and Chaussier on his trial, who intimated a doubt of the real presence of the glass, and shewed satisfactorily that it could not soon have caused death. They conjectured that if there was any such substance found, she had probably broken some vessel in her mouth and swallowed part during the convulsions. It remains only to speak of one other mineral poison, generally considered as astringent, although from its occasionally corrosive action, Orfila has classed it with those already mentioned. Of lead indeed and its preparations very little need be said, as it has seldom or never been employed to effect a criminal purpose. Under the head of Medical Police, we may hereafter show, that the common use of it for conveying water, or containing and combining with food, has not unfrequently been attended with the worst consequences. Milk, wine, and new rum, are commonly thus adulterated, and we find, in Darwin's *Zoonomia*, mention of a practice which might have attached to an innocent domestic a very plausible suspicion of poisoning.

"There is," says that great physician, "a bad custom in almost all families and public houses of washing out their wine bottles, by putting a handful of shot-corns into them, and by shaking them about forcibly to detach that supertartrate of potass from their sides; that such a practice may occasionally give origin to serious consequences, will become evident by the following relation. A gentleman who had never in his life experienced a day's illness, and who was constantly in the habit of drinking half a bottle of Madeira after dinner, was taken ill three hours after with a serious pain in the stomach and

violent cholic, which gradually yielded within twelve hours to the remedies prescribed by his medical attendant. The day following he drank the remainder of the same bottle of wine, within two hours afterwards he was again seized with the most violent pains, head-ache, shiverings, and great pain over the whole body. His apothecary becoming suspicious that the wine he had drunk might be the cause of the disease, ordered the bottle from which it had been decanted to be brought to him. This happening to slip out of the hand of the servant, disclosed a row of shot wedged forcibly into the angular bent-up circumference. On examining the beads of shot, they crumbled into dust, the outer crust (defended by a coat of black lead with which the shot was glazed) being alone left unacted on, whilst the remainder of the metal was dissolved.

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HAVING before (see vol. 1, pp. 226, 231, 272; vol. 2, p. 232, 233) drawn attention to the decision of the Lords to the effect that a foreigner, not being *de facto* in this country at the time of publication, cannot be entitled to the protection of the copyright acts, we think our readers will feel interested in the following extract, which we take from a literary publication called the *Athenæum* :—

"Another flaw, it is believed has been found in the Copyright Act. If our courts of law shall rule according to the letter of the international convention—and we do not see how they can avoid such ruling—a mode of evasion has been discovered which will enable Americans, as well as other aliens, to secure a copyright for their works in this country. An experiment, having for its object to unsettle the law once more, is being made in the case of an Italian, Signor Ruffini, author of 'Lorenzo Benoni' and 'Doctor Antonio,' two tales written in English, and intended chiefly for circulation in England. Anticipating for 'Doctor Antonio,' which has just appeared, a popularity equal to that which attended 'Lorenzo Benoni,' Signor Ruffini's publishers, Messrs. Constable and Co., of Edinburgh, were led to look into the state of the law. They found that though the English law *alone* offered no security, the French law of copyright, taken in connection with the international copyright convention between France and England, seemed to furnish it. Mr. Burke, in his 'Analysis of the Copyright Laws,' says—'According to the law of France, a French subject does not injure his copyright by publishing his work first in a foreign country. It matters not where that publication has taken place, the copyright forthwith accrues in France, and on the neces-

sary deposit being effected, its infringement may be proceeded against in the French courts. *Moreover, a foreigner publishing in France will enjoy the same copyright as a native, and this whether he has previously published in his own or any other country or not.* Then comes the pleasantry. By the first article of the International Convention of 1852 it is provided that the 'authors of works of literature and art, to whom the laws of either of the two countries do now or may hereafter give the right of property or copyright, shall be entitled to exercise that right in the territories of the other of such countries, for the same term and to the same extent as the authors of works of the same nature, if published in such other country, would therein be entitled to exercise such right; so that the re-publication or piracy in either country of any work of literature or art published in the other shall be dealt with in the same manner as the republication or piracy of a work of the same nature first published in such other country.' Here the text is clear. Publication in France confers copyright in that country, and the holder of such copyright in France becomes, in virtue of the convention of 1852, entitled to copyright in England! Let Signor Ruffini or Mr. Prescott first publish in Paris; he may then come to London, and offer Mr. Murray or Mr. Bentley a legal monopoly of his works. Such, at least, is the new reading of the law which has been acted on in Signor Ruffini's case. His 'Doctor Antonio' was published first in Paris (in English) by Galignani, all the formalities required by the French law being complied with; and thus, it is supposed, no copies of the work can be published in Great Britain except those issued by the Edinburgh publishers. Of course, the convention with France never contemplated the admission of Americans to its benefits; still, an American holding a French copyright (which he can easily hold) becomes, quoad copyright, a Frenchman, and is entitled, on the above interpretation, to the protection of the convention. Here is another and most powerful argument in favour of a revision of the law of copyright, as well as of the conventions to which it has given rise."

Contributions to periodicals [ante, p. 233].—In addition to what is stated ante, p. 233, as to the copyright of contributions to periodicals, we may state that it has been decided in Scotland, in the case of the Rev. H. Davies v. the Proprietors of the Witness, that letters sent to the editor of a paper for insertion do not become, even for the time, his property, but that the writer may, if he alter his intention, claim them back again before publication.

PEWS IN PARISH CHURCHES.

As the law upon the subject of the rights of parties to pews in parish churches is one on which much misconception prevails, the following opinion of a learned civilian, Dr. Phillimore, may be useful. We may premise that claims to pews are made generally upon the following grounds, viz.:—1. Faculty; 2. Prescription; 3. Purchase. Dr. Phillimore says:—"Purchase conveys no title at all. No point of law is more clearly established than that sale of seats in a parish church, unless under the provisions of a specific act of Parliament, is absolutely illegal and null. As to the title by prescription: a few may be prescribed for as appurtenants to a messuage, but only to inhabitants of a messuage; therefore, the claims of one person to seats, appurtenants to several messuages, cannot be sustained. The seat, if appurtenant at all, belongs to the inhabitants of the messuage. A title by prescription implies a faculty granted and lost; therefore, there must be proof of repairing time out of mind—that is, beyond memory. Eighty years have been held insufficient to exclude the authority of the ordinary. It is, moreover, fatal to such a claim that the parish or other persons should have repaired the seat within memory. A prescriptive right requires the clearest proof by immemorial occupation and repair. As to the title by faculty, the correct form is to a man and his family, so long as they continue members of a particular dwelling-house in a parish. Parties claiming under these various titles must be prepared to substantiate, by legal proof, within a reasonable time; and, if such proof cannot be produced, verbal assertion is to be disregarded. And it must be remembered, by parties claiming exemptions from the general law, that the presumption of the law is against them."

THE LAW OF MERGER.

Where particular estate and remainder are conveyed to one person—Where two terms of years are vested in same person.—We proceed to notice two subjects of the law of merger of frequent occurrence in practice, and which may, therefore, be useful to our readers. The first subject is one that, having occurred recently, the point was much considered by the conveyancers before whom the title was laid. A joint conveyance was made in fee by two persons, one being tenant for life, and the other the remainder-man in fee; was the estate in the hands of the purchaser consolidated so that the interests of the grantors were no longer separate, and were, therefore, the incumbrances on the remainder of one

of the grantors accelerated and brought down at once upon the estate?—a most important point. According to Mr. Preston, the incumbrances were not binding on the land during the life of the tenant for life. He expressly says (8 Abst. 226, 227), a joint grant from several persons, having several interests, to one individual will *not* create a merger of the interests consolidated in that person, as if (he adds) A. be tenant for life with remainder to B. in fee, and they join in a grant to C. in fee, C. will hold during the life of A. *under the title of A.*, and after his death he will hold under the title of B.; consequently the incumbrances on B.'s estate will *not* be accelerated by this mode of conveyance. The statement of Mr. Preston is very precise, and is entitled to that attention which anything coming from one so experienced in Real Property Law deserves, but there does not appear to be any good foundation for the opinion entertained by Mr. Preston, and so in the case we have referred to it was eventually agreed. A point deserving of attention might be raised as to the effect of such a conveyance where there were incumbrances of the tenant for life. Do such incumbrances attach upon the consolidated estate, so as to entitle the incumbrancer to a lien on the whole fee simple? Suppose the incumbrances were of a greater amount than the value of the life estate, would the incumbrancer be entitled to satisfaction to the full extent of his incumbrances or only to the value of the life estate? And would the death of the tenant for life have any effect on the incumbrances so far as the lien of them on the land was concerned? These are questions which, perhaps, some of our subscribers may feel themselves able to discuss, and if so we shall be glad to hear from them.

We have to observe that in Jarman's Bythewood there is a note dissenting from Mr. Preston's views, and it is there said, "Merger is that operation of law by which, when several estates coincide, and meet in the same person or persons, one of those estates becomes extinguished or annihilated in the other. In order to produce merger three circumstances must concur:—First, one estate should be immediately consecutive to or expectant on the other, and not separated by any intervening estate; secondly, the ulterior estate, which absorbs the more immediate estate should be at least equal to, if not greater (for this is *verata questio*) than such immediate estate; thirdly, the two estates should be held in the same right, though this position admits of some qualification. It should be observed, also, that a few exceptions to the doctrine of merger exist even in cases in which all the preceding circumstances concur. When the owners of several estates, by one and the same deed of conveyance,

assure those estates to a purchaser, no merger, it seems, will take place, though the estates would have coalesced if they had become vested in either of the grantors by the act of the other, or in the purchaser by two several grants or conveyances. The leading authority for this doctrine is Bredon's case (1 Rep. 77), where A. being tenant for life of land, with remainder in tail to B., with remainder over in tail to C., joined with B. in levying a fine *come ceo*, &c., to another in fee, rendering a rent-charge of £40. B. dying without issue in the lifetime of A., C. entered as for a forfeiture. A. distrained for the rent-charge, and it was held, in an action of replevin, that the fine levied by A. and B. was no discontinuance, but that each of them gave only that which he might lawfully give, viz., the tenant for life gave his estate, and he in remainder a fee simple determinable; and judgment was given in favour of the tenant for life, who had a return of the cattle distrained, after they had been replevied, on the ground that there was not any forfeiture, and that the rent, and, of consequence, the title or seisin under the tenancy for life, continued after the death of the tenant for life, continued after the death of the tenant in tail without issue. And in Treport's case (6 Rep. 14), it was said by Popham, C. J., "If tenant for life, and he in the reversion make a gift in tail rendering rent, the lessee shall have the rent during his life. This, of course, observes Mr. Preston, was an admission that the estate of the tenant for life, was a continuing ownership; for unless that estate existed in point of law distinct from the inheritance, and not confounded in the same, the rent could not have belonged to the tenant for life; and Popham, in terms still more express, declared it to be his opinion that if tenant for life, and he in the reversion had made a feoffment by deed at the common law, the feoffee should hold of the lessee during his life, which proves, in a manner the most incontrovertible, that the estate for life was not destroyed, for supposing it to have been destroyed, the tenure must have been of the reversioner, and not of the tenant for life. From this opinion it must be collected, that if the estate tail had determined in the lifetime of the tenant for life, the right of possession would have been in the alienee under the estate for life, and not in the reversioner, till the estate formerly of the tenant for life was determined by his death, or by some other means (3 Prest. Conv. 416). The doctrine under consideration was also distinctly recognised by Sir Henry Hobart, in the Earl of Clanrickards case (Hob. 278), where a lady was tenant in tail, with reversion to her husband for life, and they joined in a fine, and it was contended that this fine was a discontinuance

by the tenant in tail, and so the estate for life did drown and extinguish itself in the fee simple granted to the donee. The learned judge answered this argument by premising that the estate for life is not by that fine drowned and extinct, but that the estate in tail and for life are both conveyed lawfully as estates in being to these donees; so first, the estate for life is not forfeited by this fine; secondly, it is not involved in the estate given by the tenant in tail, but it is given distinctly as an estate by itself in judgment and by the force of law. It will occur to the learned reader that *Clanrickard's* case does not properly exhibit an illustration of the exception to the general doctrine of merger under consideration, since, according to the general doctrine, an estate for life could not merge in a prior estate tail; but the reasoning of the learned judge quite lost sight of this fact, for it treats the case before him and *Bredon's* case as referable to the same principle, and the following passage in his judgment distinctly recognises the principle which has been deduced from that case: "Where a tenant for life, and he in remainder join in a fine, and the tenant in tail dies without issue, the donee shall hold the land during the life of the tenant for life." This doctrine, therefore, is well fortified by authority, though it would be difficult to find any very solid reason for it. The doctrine is at least recommended by its result, for it gives a man all that he has contracted to purchase, part of which the law of merger, if it operated in this instance, would, by extinguishing one of the estates, take from him. This exception, it is conceived, would only apply where the estates conveyed to the purchaser did not exhaust the whole fee simple; if they did, as no advantage could arise to the purchaser from the estates remaining in him distinct, they would become consolidated. Thus, if lands stand limited to A. for life, with reversion or remainder in fee to B., and A. and B. join in conveying their respective estates to C., C. would become tenant in fee simple in possession.

Merger of leaseholds.—The other topic we have alluded to is that of the merger of leasehold interests. We may observe that the doctrine of merger was but little attended to by the old law writers, and it is only in isolated passages that traces of it can be found, even in *Coke's Commentary* on Littleton; and *Blackstone*, in the 2nd volume of his Commentaries, c. 11, p. 177, despatches it in about one page. It remained for Mr. Preston, in his third volume of *Conveyancing*, to assign to the law of merger its place in a treatise on real property. We propose to examine the little that *Blackstone* has said on this subject, with a view to a more full elucidation of the doctrines of merger, particularly as applied to terms for years. He says, "Before we

conclude the doctrine of remainders and reversions, it may be proper to observe that, whenever a greater estate and less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more." It is clear from this, and the other examples which *Blackstone* gives, that he never considered the case of a merger of one term of years in another term, whether longer or shorter. Indeed, before Mr. Preston's consideration of the subject, it was a point of considerable diversity of opinion whether, in such case, a merger could take place. In *Hughes v. Robotham*, Cro. Eliz. 302, Popham, J., said, "It is clear that he which hath an estate for ten years may surrender to him which hath an estate for twelve years, and the estate is drowned, and the other shall come in possession; and there is no doubt but a surrender to him who hath a greater estate for years is good, as to him who hath an estate for life; which Gawdy did expressly affirm; and here it standeth indifferent if the reversion hath a greater estate for years or not; and Popham conceived that if the reversion was for a less number of years, yet the surrender is good, and the estate shall drown in it." Notwithstanding this authority, the point was not considered as settled until the decision of Sir John Leach, in *Stephens v. Bridges*, 6 Mad. 66. There a mortgage term of 1000 years had been created in 1720 to secure £8,000, which became vested in A. in 1757. In 1780, A.'s executor, being possessed of this term for 1000 years, took an assignment of another mortgage term of 500 years upon the same premises, which had been created in 1725. Sir John Leach, in his judgment, said, "it is a clear principle that the term merges by union with the reversion, and that the right to the term, and the right to the estate subject to the term, cannot separately subsist in the same person. It is settled by authority that there is no difference in this respect, whether the party is entitled to the absolute interest of the reversion, or to an interest in the reversion for a limited time. The trustees have united in them the original term of 1000 years, and the right to the reversion for a term of 500 years. By law, therefore, the term of 1000 years is merged in the reversionary term of 500 years." The cases here cited only show that a merger of a term in another, even though shorter term, may take place where the latter is a reversion; but it has not been expressly decided that a merger would take place if the latter term were in remainder (See 3 Cox, 201 n. 6; Cruise's Digest, 477, by White,

who contends that they will not merge, because, in the first place, each of the termors holding of the reversioner, there is no privity of tenure (see 8 Prest. Conv. 191); and, therefore, their co-existence in one person is not incompatible with the maxim *non potest esse dominus et tenens*; and, in the second place, all terms being in estimation of law equal in point of quantity, there can be no merger, because equal estates do not merge (but see 8 Prest. Conv. 301). We may also refer to the discussion of the Birmingham Law Students' Society, *ante*, p. 235, where the reader will find this subject noticed with the usual ability which distinguishes that society.

Interesse termini.—We have shown before that where two terms coincide and meet in one and the same person, the former will merge in the latter. The question whether, where the first term is an *interesse termini*, such a merger will take place, obviously depends on the nature of an *interesse termini*. Blackstone (2 Com. 144), in speaking of a lease, says that it does not of itself vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini*. The distinction between such an interest and a term of years is thus stated by Littleton (s. 459): "If a man letteth to another his land for a term of years, if the lessor release to the lessee all his right, &c., before that the lessee had entered into the same land, by force of the same lease, such release is void, for that the lessee had not possession of the land at the time of the release made, but only a right to have the same land by force of the lease; but if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor (being lessor) or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them." On this section Lord Coke says, "*Before entry the lessee hath only an interesse termini, an interest of a term, and no possession; and, therefore, a release which enures by way of enlarging of an estate cannot work without possession, for before possession there is no reversion.*" Having thus stated what the nature of an *interesse termini* is, we now proceed to consider the authorities as to such an interest merging or not in a term. In the 3rd volume of Preston's *Treatise on Conveyancing*, which is devoted to the subject of merger, p. 122, it is said, "By union of the estate and of the *interesse termini*, there may be an extinguishment, though there cannot be a merger properly so called, or the corresponding effect of surrender." For this the case of *Salmon v. Swanin*, Cro. Jac. 8, 19, is cited. There B., the owner of the fee, subject to an *interesse termini* for 100 years, to commence on the death of C., made a lease for 21 years, and then took a grant of the *interesse termini*.

B. then granted a rent charge of £20 per annum, and the only question was whether the arrears of the rent-charge accrued due before C.'s death should prevail against the lease for 21 years, which would be the case if the term of 100 years should be considered as in *esse* after the grant, being prior to the term of 21 years; but if the *interesse termini* were considered as no longer existing, the tenant for the term of 21 years could not be distrained upon for the arrears of the rent-charge. It was held that it was drowned in the inheritance, for notwithstanding the lease for years, the term of 100 years was not so severed from the reversion, but that by the grant thereof to him who hath the inheritance the future term was drowned. Now, in commenting upon this case, Mr. Justice Bayley, in *Doe v. Walker*, 5 B. and C., 111, stated *infra*, says, "I take the principle upon which it was decided to be this, that the grant to B. operated not to keep alive the *interesse termini*, but to destroy it; since it could not be presumed to have been obtained by B., that he might set up the term upon C.'s death, and defeat his own lease for 21 years, but rather to have been obtained by him to protect his own lease for the honest purpose of extinguishing the right, and not for the dishonest purpose of fraudulently defeating an interest created by himself by setting up the term of 100 years." Again, in page 124, Mr. Preston says, "So by the descent or accession of the freehold to a person who has an *interesse termini*, there will be an extinguishment of the interest under the term;" but it does not appear, upon a close inspection, that the learned author is borne out in his statement by the case of *Colbourne v. Mixstone*, 1 Leon. 129, which he adduces, for it now seems that that case has been very inaccurately reported by Leonard. The question was, whether a devise by the lessor of two houses to Alice Leigh for life had extinguished a lease of the same premises granted to Alice Leigh for 21 years; now, if this lease for 21 years had given Alice Leigh an immediate vested interest, then, by the laws of merger, that interest would have been drowned by the accession of the life estate; but if that lease was to commence in *future*, or was merely an *interesse termini*, then we have seen that no merger could ensue, as there would be no coincidence of two estates, an *interesse termini* not being considered an estate. According to Leonard's report, which Mr. Preston has followed, the houses were in lease to Alice Cheap for 21 years, if she should so long live, and the lease to Alice Leigh was a lease in reversion for 21 years; but upon an examination of the record, it appears that what was called a lease in reversion to Alice Leigh, was a lease of the reversion commencing immediately from the date of the lease, thereby giving an immediate vested interest, and not a lease in rever-

sion, commencing *in futuro* on an *interesse termini*, consequently this case of Colbourn v. Mixstone, when properly examined, cannot be found to support the position of the learned author. The points above alluded to were fully discussed and decided on by the Court of Queen's Bench in Doe v. Walker, 5 Barn. and Cr. 111; 7 Dowl. and Ryl. 487, S. C., and we shall, therefore, introduce a short statement of the facts and the judgment of the court, so that our readers may see how far the views of Mr. Preston have been adopted or rejected. In that case, one J. W., in 1799, made a lease to T. W. of certain premises for a term of 60 years, to commence in 1809; in the year 1800 T. W. died, having devised the same premises to J. W. for life; in 1806 J. W., by lease and release, conveyed away the legal estate of his life-interest in the premises to a trustee, in trust for him. J. W., therefore, had the legal estate for his own life, from the testator's death in 1800, until 1806, when the legal estate was conveyed to his trustees; and the question was, whether the term of 60 years was merged in the life estate, which depended upon the question, whether the term to commence *in futuro*, in 1809, merged in the existing life estate. The judgment of the court was delivered by Bayley, J., who, having stated that J. W.'s interest under the lease of 1809, was a right to have the possession at a future time, or an *interesse termini*, proceeded to show how inapplicable the laws of merger were to an interest of this description: "There must be an union of two estates, but here there is no such union. The *interesse termini* did not acquire the character of an estate, before the legal interest in the life estate was passed away; instead of two estates having been in J. W. at the same time, he had never in him more than one estate. He had nothing but the life estate until the year 1809, and nothing but the term after that period. Then where is the inconsistency or incompatibility which is essential to constitute a merger? Where a man, but for the doctrine of merger, would be reversioner to himself, would be tenant for years with an immediate reversion in himself for years, for life, or in fee, there is no inconsistency and incompatibility in his filling both characters. He, in the character of reversioner, would be the person to call upon himself for waste, if his reversion were in fee, or for life; it would be to himself he would have to perform the services due from him as tenant; and as reversioner, even for years he would be able to interpose his second term to protect himself from acts of forfeiture committed by him as tenant under the first; in order to prevent these, and similar objections, the doctrine of merger is founded. But where is the inconsistency or incompatibility of a man having, not two concurrent, but two successive

estates? The objections apply only where they are concurrent; they do not apply where one follows the other. If tenant for years acquire a life interest in the estate *pur autre vie*, the two being concurrent, only one can exist, and the other is merged; but why may not a lease be granted to tenant *pur autre vie*, &c., to commence when his life estate ceases? He will then be tenant of the freehold so long as *cestui que vie* lives, but amenable to the reversioner for every duty to which that tenancy is subject; and he will be tenant for the term when *cestui que vie* dies, and still amenable to the reversioner for all the duties of that tenancy; he will never stand in the character of reversioner to himself, which the law of merger is calculated to prevent; therefore there can be no merger in this case."

"JUSTICES OF THE PEACE."

(ante, p. 169—172).

SIR,—After careful perusal of your contributor's article, headed "Justices of the Peace," a reflective mind will come to the conclusion that many of the assertions therein contained are both unwarrantable and unwise, and that such article is altogether written in a spirit very different from the one which should evidence itself in the LAW CHRONICLE. In fact, it is a tissue of baseless and almost altogether unsupported assertion, except where it is somewhat borne out by one-sided poetic quotations. It is rarely indeed that a magistrate misconducts himself—it is rarely indeed that he is a man "more acquainted with the rude gossip of his hamlet than with the dictates of common sense or common justice"—it is rarely indeed that he is "more accustomed to spend his leisure hours in the revelry of a tavern than in endeavouring to acquire any knowledge of the laws which he has sworn to obey and righteously to administer," though the same could not be said perchance of some stipendiary magistrates, even in Liverpool or London. Would that every paid magistrate was as careful, as just, as deeply reflective, and, in some instances, as well acquainted with the science of the law as many of those "big-bellied country squires" (as the writer of the article in his own mind, no doubt, imaginatively, but in my opinion coarsely, terms them). What guarantee have we that a paid magistrate will do, or knows his duty—almost in every instance selected by family influence from a herd of men never able to support themselves by their own unaided professional exertion, but from being the scions of some noble family, or mayhap from having sported in their infant days in the housekeeper's room of some great mansion (such instances have been recorded), are foisted upon the public, there to

batten and feed? Why, at the best they are chosen from a class of men of whose professional ability the only criterion at present is their capacity to gorge "a comfortable and inexpensive dinner" (as Blackwood has it) some twelve times a year, for a period not extremely long. I challenge an impartial inquiry into the conduct of county justices at sessions, and upon such inquiry it will be found that they come out of the furnace untarnished, being the pure metal unalloyed, and that as a class they are distinguished for ability, moderation, patient carefulness, and last, not least, their wish to arrive at the unveiled truth. An instance, of "an acute, far-seeing, thoughtful, and learned" salaried magistrate I shall in conclusion give, having myself the happiness to be an eye and ear witness of the *denouement*—At the last winter gaol delivery in a certain town two persons were brought before Baron ———, charged with highway robbery; the evidence for the prosecution was chiefly policeman's evidence, and we all know what policeman's evidence is, and what dove-tailing is; on the other hand six or eight, at least half-a-dozen, unbiassed witnesses had testified before the "learned" stipendiary (the committing magistrate) to the innocence of the prisoners—these the "learned" stipendiary either refused altogether to hear, or, hearing them, declined taking down their evidence, committing the prisoners for trial. At the trial the evidence for the prosecution was gone through, "and all went smoothly as a marriage bell" until the prisoners' witnesses were examined: then came the rub—the learned judge declaring before half the defence was gone into that the prisoners' innocence was apparent, and, ordering them to be discharged, stopped the case, commenting severely on the one-sided manner in which the "acute" stipendiary had taken down the depositions. The same "far-seeing" stipendiary not long ago declared in court, "that an Irishman's word was not worthy of credence." I have delayed until now replying to your remarks, under the hope that in your next issue they might be softened, or that they might be answered by some one more worthy for the task than myself; but as such is not the case, in common justice I demand an insertion of the above in your next issue—should you not do so, I shall endeavour to call attention to and give it publicity elsewhere.

I am, &c.,

CAIUS (Newcastle-on-Tyne).

NOTE.—We have given insertion to the above on the principle of *audi alteram partem*, but we think it will be evident that our previous contributor (whose experience as a country practitioner entitles him to speak with some authority on the subject) refrained from any observations which could be considered as

unnecessarily severe, whilst at the same time he was compelled by the necessity of the case to speak out plainly as to the effects of the present system. We apprehend no one desires that a man should be appointed a justice of the peace merely because he has succeeded in obtaining a call to the bar, it being well known that, at present, at least, that is no test of capacity. But the point which our contributor was anxious to impress on his readers was the necessity for appointing men fitted to the due fulfilment of so important an office as that of a justice of the peace.—EDS.

SOLICITORS AS THE PATRONS OF BARRISTERS.

IN the course of the examination of witnesses, upon the late commission respecting the Inns of Court, Mr. Phillimore, the able, though somewhat eccentric, Lecturer or Reader on Constitutional Law gave utterance to some crude notions of his own, respecting the alleged deterioration of the bar, by reason of the indiscriminating patronage by solicitors of its members, moved either by friendship or some other motive unconnected with the fitness of the barrister for the discharge of his duty. We should not have thought it worth while to notice remarks which we must consider as disparaging to solicitors, but the so-called Solicitors' Journal having thought otherwise, we present some of its remarks thereon together with the evidence of the Lecturer.

We take this opportunity of observing that we are not opposed at all to solicitors being placed in a position for being more readily called to the bar, but, of course, if this is to be done there will be a reciprocity, and under that system, we think, that solicitors will lose far more than they can gain; for under such circumstances it will be found that most candidates for the bar will first commence as for solicitors, and there can be no doubt that when they find out, as soon they will, that that branch of the profession is the more profitable one, they will be satisfied with that position, rather than push on for the bar, where the chances of success are so small. There are now nearly 4,000 barristers, and, of course, there is not a living for more than 200 or 300 at the utmost—a thing which will be very evident when it is considered that some barristers in good practice have twenty or thirty clients, and even those in moderate practice have from ten to a dozen. If the number of solicitors be considered, it will be plain that not more than the above number of barristers can live by their profession. And even some of the most successful have not earned sufficient to pay their rents and clerks till after several years from their call. In truth, it is almost

madness for a man without a fortune, or a literary turn of mind, or a good professional connexion, to go to the bar. And this brings us to the consideration of two points which appear to affect Mr. Phillimore in a special manner; first, that solicitors have the patronage of barristers; second, that solicitors clerks become barristers. As to the first, how is it to be avoided, or rather why should it be avoided, seeing that solicitors are the most capable of judging in this matter. We fear it is too true that the complaint arises from a feeling that the great talents of the complainant have not been duly appreciated, and, therefore, the patronage ought to be placed in other, and, of course, more discriminating hands. Sure we are, that men in practice are never found to complain on this head, nor have they the least desire that the solicitors should be deprived of what is really their right both by position and capacity.

As to the second head of complaint, that solicitors clerks are allowed to be called to the bar, we can say for ourselves that we see no objection in it, provided, such persons are otherwise unexceptionable. No doubt they possess two advantages over other barristers; first, because they, in general, have a professional connexion ready to support them, which, however, would not alone avail them, if not accompanied by, secondly, a thorough acquaintance with the practical part of professional business, which enables them to give more appropriate advice for the guidance of the solicitor, and to make allowances for those difficulties which are sure to beset the solicitor in carrying out any, even the best considered plan of operations. It is not, therefore, surprising that several solicitors clerks have met with great success at the bar, and are in possession of goodly incomes by the exercise of their abilities. Let it not, however, be thought that this has been effected without much struggling, and in some instances, entire failure has been the fate of those who could not afford to wait till business flowed in. It must not be forgotten that it is not every acquaintance who will prove to be a client, and there is little doubt that in some instances the fact of a man's having been a clerk, has been an obstacle rather than an advantage. We had not intended to proceed to this length, our purpose being to introduce Mr. Phillimore and his commentator, who thus speak:—

"The learning and eloquence, the skill and tact, —the practical knowledge and experience,—the power of laborious application,—the acuteness, facility, and quickness of apprehension,—the promptitude in overcoming difficulties,—the ingenuity, the subtlety, and the powers of reasoning, of the variously gifted members of the bar are to be duly appreciated by the attorney, and the selection con-

scientiously made according to his knowledge of the nature and difficulties of his client's case.

"It need not be said that it is the interest as well as the duty of the attorney to select the best counsel in his power. Where he is concerned for the plaintiff he has usually the choice of counsel, unless the defendant, anticipating the suit or action, has secured the favorite advocates by general retainers.

"We have heard it said, and it may be occasionally true, that the attorney selects a relation or an intimate friend at the bar, who may not stand in the front rank of advocates; but there are many cases which do not require pre-eminent abilities for their management or success. Perhaps, indeed, the majority of causes are as well conducted by a diligent second-rate counsel as by an advocate oppressed with the weight and multiplicity of his engagements.

"There is therefore a large field for the exercise of the discretion of the attorney in choosing a representative of his client in court, without imputing to him any undue favouritism. And the counsel who has ably discharged his duty in the first case introduced to him by the attorney, will in a similar class of cases be again retained.

"Mr. Phillimore, the Queen's Counsel and reader on Constitutional Law and Legal History at the Inns of Court, and member for Leominster, in his evidence (or opinion) given before the commissioners on the Inns of Court and Chancery, states again and again his objections to the power possessed by the attorneys to select from the bar such counsel as they think proper. He says—

"I think one circumstance, which I do not however see the means of escaping from without incurring greater evils, the circumstance of the more highly educated branch of the profession depending for distinction and profit upon a class quite inferior to it in education and sentiment, has a very pernicious effect upon the higher class. The only way of obviating that is to raise the standard of education in those who are called to the bar. The great evil that our profession has to struggle against is, and has been, the narrowing and illiberal tendency, which must be the result where men look for encouragement and reputation to persons of inferior education; I speak of course generally. It is not likely such persons should encourage qualities they do not understand and cannot appreciate. I attribute the superiority of the French bar over the English, principally to the study of the Roman law, and of the theory of jurisprudence added to the absence of the evil I have noticed, in the almost absolute power of attorneys over the English bar.

"I should not myself limit the class from which the student is taken; I should say any person of fair moral character, even if he belonged to the

humblest class of society, should have an opportunity of coming to be a candidate for the bar, and taking his chance of being afterwards able to pass an examination. Passing that examination requires a knowledge of English history, and that is why I particularly insist upon the necessity of attending the lectures on Constitutional law and legal history, or general jurisprudence. I hope I shall not be supposed to undervalue the advantages of a knowledge of Latin and Greek in any way, but I would not exclude any person in consequence of the want of possessing it from the opportunity of becoming a barrister. I think the system I have mentioned would give a much higher education. You would have the same people who come to the bar now, with certain restrictions. The way to raise the profession, I think, is the way which I have pointed out, by obliging people to acquire a certain amount of knowledge before they enter it, and by holding out other motives than the *favour of attorneys* to them. The same people who would be called to the bar now, would be called to the bar then; therefore, I should not lower the standard in any way.

"I venture to repeat that the evil which we are now suffering from is that to which Lord Bacon refers when he says, 'The rewards of learning are in the hands of the unlearned.' *Præmia sapientiæ penes vulgus.*" The more you can correct that the better, and diminish the *overwhelming and malignant influence of attorneys on our branch of the profession!!!* A question is then put to Mr. Phillimore to this effect: At present one of the best methods of ensuring success at the bar is for an attorney's clerk to go from an attorney's office to an inn of court, and be called to the bar; would not your system still ensure to such a person an undue chance of success in the profession? Then Mr. Phillimore answers thus: 'No doubt it would, but that would not be the result of my system. I should not take away the undue chance he has, but I should not add anything to it.' A further question is then put: The state of things which now exists is one which may be regarded, perhaps, as undesirable. Your system of doing without any preliminary examination would not get rid of that objection. 'It would not, certainly.' Again, and we request attention to the answer: If there were a preliminary examination, it would, of course, stand in the way of a person of that sort till he had acquired a proper amount of information? 'Perhaps, in some degree. *Some attorneys can read Latin, I believe!!* However, I think it a very fair question to consider, but at the same time there would be a great responsibility in saying that no man should be allowed to be a student at law except he had certain advantages of education previously. I think it a great evil that a man, from having been

an attorney's clerk, should come to the bar, and have chances which other people have not, but my system would not lead to any more of that class being called to the bar than are so now.'

"Now, does the learned and honourable member suppose that if the barrister had direct communication with the suitor, unassisted by an attorney, that he, who perhaps had only one suit in his whole life, would make a better selection than an attorney who, if he did not rely on his own experience, might have the advantage of the opinion of his brethren if he had any doubt of the selection he had to make?

"We know that the merits and defects of leading counsel come frequently under discussion amongst solicitors, and no doubt an accurate estimate is formed of their respective qualifications and the several classes of cases in which they are best fitted to excel. The struggles between attorneys to secure a favourite counsel for their clients are well known. Special retainers are attempted to be superseded by general retainers, and the slightest mistake in the title of a cause is made the subject of controversy.

"In the unsettled state of the practice, the appeal being made from one barrister to another, and no rules being published to guide the practitioner, many questions arise. The Incorporated Law Society, indeed, have established certain regulations which are binding on their members, but not recognised by the bar, although they were previously submitted to the consideration of every leading counsel.

"It is evident, therefore, that the choice of counsel must rest with the attorney, except in cases where the client desires a retainer to be given, either to some eminent well-known advocate, or to some friend or relative. The latter is not unfrequently the case."

THE BANKRUPTCY LAW.

(Continued from p. 208).

Last Examination—Choice of Creditors' Assignees—Property Vesting in Assignees.

LAST EXAMINATION.

Though not strictly in the regular course of the proceedings under an adjudication, it will yet be convenient here to notice the subject of the last examination of a bankrupt.

Time for last examination.—We have seen that the advertisement of the adjudication mentions the day for the final examination, which is usually sixty days after the advertisement (*ante*, pp. 44, 152, 175). The time may be extended by adjournment.

Preparing and filing balance-sheet and accounts.—Ten days prior to the last examination the bankrupt must prepare, sign, file, and deliver copy of his

balance-sheet and accounts. This is by sec. 160 of the Consolidation Act, which also provides for an allowance for the preparation of the balance-sheet and accounts (but not for the official assignee doing so, see 1 Law Chron. p. 19), and is as follows: "That the bankrupt shall prepare such balance-sheet and accounts, and in such form as the court shall direct, and shall subscribe such balance-sheet and accounts, and file the same in court, and deliver a copy thereof to the official assignee, ten days at least before the day appointed for the last examination, or the adjournment day thereof for that purpose; and such balance-sheet and accounts, before such last examination, may be amended from time to time as occasion shall require, and such court shall direct; and the bankrupt shall make oath of the truth of such balance-sheet and accounts whenever he shall be duly required by the court so to do; and the last examination of the bankrupt shall in no case be passed unless his balance-sheet shall have been duly filed as aforesaid; and the court may, on the application of the assignees, or of the bankrupt, make such allowance out of the estate of the bankrupt for the preparation of such balance-sheet and accounts, and to such person as the court shall think fit, in any case in which it shall be made to appear to the satisfaction of the court, from the nature of the accounts or other good cause, that the bankrupt required assistance in that behalf."

Filing balance-sheet with registrar.—By rule of 19 Oct. 1852, pl. 50 "the bankrupt's balance-sheet must be filed in duplicate with the registrar of the court ten days at least before the day appointed for the last examination of the bankrupt, or the adjournment day thereof for that purpose (one copy for the official assignee, and the other for the proceedings); and the last examination of the bankrupt shall in no case be passed by the court unless his balance-sheet shall have been duly filed as aforesaid. Office copies of the balance-sheet, or such part thereof as shall be required, shall be provided by the proper officer."

Adjournment of last examination, with protection.—By sec. 162 of the Consolidation Act, "it shall be lawful for the court at the time appointed for the last examination of the bankrupt, or at any enlargement or adjournment thereof, to adjourn such examination *sine die*; and in such case the bankrupt shall be free from arrest or imprisonment, for such time (if any) as such court shall from time to time, by endorsement on the summons of the bankrupt, think fit to appoint."

Bankrupt arrested voluntarily surrendering.—By sec. 161 of the act, "if any bankrupt apprehended by any warrant of the court shall, within the time allowed for him to surrender, submit to be examined,

and in all things conform, he shall have the same benefit as if he had voluntarily surrendered."

Bankrupt being in prison to be attended with books, &c.—By sec. 163 of the Consolidation Act, "whenever any bankrupt is in prison or in custody under any process, attachment, execution, commitment, or sentence, the court may appoint a person to attend him from time to time, to produce to him his books, papers, and writings, in order that he may prepare his balance-sheet, and show the particulars of his estate and effects, previous to his last examination and discovery thereof."

CHOICE OF CREDITORS' ASSIGNEES.

Time of choice.—The choice of creditors' assignees is usually made at the first public sitting after the adjudication, but the choice may be adjourned to another day appointed by the commissioner.

Persons entitled to vote.—Creditors who have proved debts to the amount of £10 may vote in the choice either in person or by letter of attorney. The choice is made by the major part in value of such creditors.

Sec. 139 of the Consolidation Act—Assignees of the bankrupt's estate, when and how chosen.—The following are the provisions of sec. 139 of the Consolidation Act:—"That at the first public sitting appointed by the court under any bankruptcy, or at any adjournment thereof, assignees of the bankrupt's estate and effects shall and may be chosen and appointed, and all creditors who have proved debts to the amount of ten pounds and upwards shall be entitled to vote in such choice, and also any person authorised by letter of attorney from any such creditor, upon proof of the execution thereof, either by affidavit or by oath before the court *vivâ voce*; and the choice and appointment shall be made by the major part in value of the creditors so entitled to vote; provided that the court shall have power to reject any person so chosen who shall appear to such court unfit to be an assignee, or to remove any assignee, and upon such rejection or removal a new choice and appointment of another assignee shall be made in like manner."

Joint creditor proving under separate estate.—Though separate creditors cannot vote in the choice of assignees under a petition against several persons, yet a joint creditor may vote on a petition against one or more partners of the firm who are indebted to him. This is by sec. 140 of the Consolidation Act, which enacts, "That if any one or more of the partners of a firm be adjudged bankrupt, any creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall be entitled to prove his debt, for the purpose

only of voting in the choice of assignees, and of being heard against the allowance of the bankrupt's certificate, or of either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt until all the separate creditors shall have received the full amount of their respective debts."

Estate vesting in assignees.—Until the appointment of assignees and their election (where such is necessary) to take the property, the estate (except where a provisional assignment was executed) was formerly in the bankrupt; but as by sec. 40 of the Consolidation Act the official assignee is to be deemed, to all intents and purposes, the sole assignee of the bankrupt's estate and effects until the appointment of the creditors' assignees, it seems to follow that until such appointment the estate and effects of the bankrupt (except copyholds, estates tail, and leaseholds) are vested in the official assignee (see *Turner v. Nicholls*, 16 Sim. 565; *S. C.* 18 Law Journ. N. S. Chanc. 278; 18 Jur. 293). On the appointment of creditors' assignees and their election to take (where necessary), their title attaches (jointly with the official assignee), and has a retrospective operation; that is, relates back to the time when the trader became bankrupt, so as to over-reach and annul all intervening alienations and executions, except so far as against the Crown, and also except such alienations and dealings as are by the Consolidation Act rendered valid (*Mann v. Ricketts*, 9 Jurist, 1108; *Princ. Com. Law*, 108–111). We shall presently state the provisions of the Consolidation Act, but we may now remark that all the real estate of the bankrupt (whether situate in the United Kingdom or elsewhere, within Her Majesty's dominions), and all his personal estate, wherever situate, and all his rights of action, except those for personal wrongs (*Howard v. Crowther*, 8 Mee. and Wels. 601), and all his rights of entry (*Clark v. Calvert*, 8 Moore, 96), and all powers which he is entitled to exercise for his own benefit, pass to and become vested in the assignees by their mere appointment; i. e., originally in the official assignee, and afterwards in him and the creditors' assignee (11 Jur. 482; 15 Jur. 682); with the exception, however, of what belongs to the bankrupt in the capacity of trustee for others (*Pranham v. Hurst*, 8 Mee. and Wels. 748; *Thorpe v. Goodall*, 17 Ves. 270), any office which he holds of such a nature that it cannot be legally sold (*exp. Butler*, 1 Atk. 210; *Hammond's Eq. Dig.* p. 83; *Gibson v. East India Co.* 5 Bing. N. C. 262), his right of nomination to any vacant ecclesiastical benefice (1 Burn's Eccl. Law 125), his military pay under the Crown, and his military pension under the East India Company (*Hammond's Eq. Dig.* p. 83; *Gibson v. East India Co.* 5 Bing. N. C.

262), none of which are at all affected by the bankruptcy. There are also some other exceptions to the general rule of all the bankrupt's estate passing to the assignees by the appointment; as in the instance of estates tail and copyholds, the transfer of which is specially provided for (3 & 4 Will. 4, c. 74, s. 55–65; 1 Steph. Com. 246); and also of leases held by the bankrupt, which it is at the election of the assignees either to except or renounce. It may also be noticed, that property which does not belong to the bankrupt may pass to his assignees, on an order being obtained, by being in the bankrupt's possession, order, or disposition, by consent of the true owner, and of which the bankrupt was reputed owner (12 & 13 Vict. c. 106, ss. 141, 142, 147; *Clarke v. Spence*, 4 Adolph. and Ellis, 448; *Edward v. Scott*, 1 Man. and Granger, 962; 2 Steph. Com. 206).

Personal estate to vest in assignees.—We now proceed to notice the particular provisions of the Consolidation Act, and first, as to the personal estate of the bankrupt. By sec. 141, it is enacted "that when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him, before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment, neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

Real estate of bankrupt vesting in assignees.—As to the bankrupt's real estate, sec. 142 provides, "that when any person shall have been adjudged a bankrupt, all lands, tenements, and hereditaments, except copy or customaryhold, in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to her Majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such

lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose." As to an estate tail in copyholds, where there is a particular custom, see *Johnson v. Smiley*, 17 Beav. 223.

Registering appointment of assignee so as to bind real estate.—In order to render the appointment of assignees complete, the commissioner should sign same, and also a certificate thereof, which latter should immediately be registered where it is apprehended that the Crown or its debtors may be entitled to issue an extent, or where a conveyance would require to be registered. Thus by sect. 148 of the Consolidation Act it is enacted, "that where according to law any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office in England, Wales or Ireland, or in any registry office, court, or other place in Scotland, or in any of the dominions, plantations, or colonies belonging to her Majesty, then in every such case the certificate of the appointment of assignees of the estate and effects of the bankrupt shall be registered in the registry office, court, or place wherein such conveyance or assignment would require to be registered, enrolled, or recorded, and such registry shall have the like effect to all intents and purposes as the registry, enrolment or recording of such conveyance or assignment would have had; and the title of any purchaser of any such property for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase-deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of assignees, or of the vesting of such property in them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following: that is to say, as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment, and as

regards all other places within twelve months from the date thereof."

Crops and effects in husbandry, &c.—By sec. 144 of the Consolidation Act, "no assignee of any bankrupt's estate, nor any purchaser from any such assignee of any goods, chattels, stock, or crop, being part of the estate of any bankrupt engaged or employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings intended for such lands, and being thereon, in any other manner or for any other purpose than such bankrupt so employed in husbandry ought to have taken, used, or disposed of the same if he had not been adjudged bankrupt (see 56 Geo. 3, c. 50, s. 11). In *Experte Maundrell* (Buck. 83), the assignees were held entitled to the offgoing crop under a covenant that the lessee 'at the expiration or sooner determination of the term' should take the offgoing crop, the lease being determined by order of the Lord Chancellor. The 14 & 15 Vic. c. 25, s. 3, has made great alteration in the rights of the tenant with respect to buildings and fixtures on farms, and according to the general principles laid down in section 141, and the cases thereon, it seems to follow that the assignees would now be able to avail themselves of the option given by that section. It enacts, 'That if any tenant of a farm or lands, shall, after the passing of this act, with the consent of the landlord for the time being, at his own cost and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such building, engines, and machinery shall be the property of the tenant, and shall be removeable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed. Provided nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed

to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same."

Rights of the Crown, how affected.—As an extent binds the property of a Crown debtor from its *teste* (West on Extents, 58; Rex. v. Mann, Strange, 749), it will, if tested prior to the appointment of the assignees, be effectual, and bind the property (Att. Gen. v. Capel, 2 Strange, 480). It has been determined that an extent tested on the same day as the appointment (i. e., as the law then stood, the assignment to the assignees) would prevail against the assignees (Rex. v. Crumpton, cit. 2 Ves. 295); but it is doubtful whether this would be now so decided, as fractions of a day are now in similar cases regarded (Hensley's Bankr. 287, 3rd edit). With respect to the bankrupt's *real estate*, as the assignment formerly executed to the assignees required to be *enrolled* before the *teste* of the extent, in order to defeat the claim of the Crown, and (as before stated) by sect. 143 of the Consolidation Act, where any conveyance would require to be enrolled, the certificate of the appointment of the assignee shall be registered instead, the Crown will not be barred until the enrolment of the certificate (Rex. v. Hopper, West's Extent, 149). The 127th section of the Consolidation Act contains a provision to prevent the effects of fraudulent extents in aid. It enacts, "that if any real or personal estate or debts of any bankrupt be extended, after he shall have become bankrupt, by any person, under pretence of his being an accountant of or debtor to the Queen, the court may examine upon oath whether the said debt was due to such debtor or accountant upon any contract originally made between such accountant and the bankrupt; and if such contract was originally made with any other person than the said debtor or accountant, or in trust for any other person, the court may order such real and personal estate or debts to be sold, for the benefit of the creditors under the bankruptcy, and such sale shall be valid against the said extent, and all persons claiming under it; and any person to whom the said real and personal estate or debts shall be bargained, sold, granted, or assigned by the court shall have and may recover the same against any person who shall detain the same."

Offices and powers.—The following offices pass to the assignees, viz., any offices which the bankrupt might transfer, or even though they cannot be transferred without the leave of the patron, if customary to transfer it with the leave, or which he holds

quamdū se bene gerit. But offices concerning the administration of justice do not pass (Flarty v. Odium, 8 Term Rep. 681; Sterry v. Clifton, 9 Com. Ben. 110; S. C. 19 Law Journ. C. P. 237; exp. Butler, 1 Atk 210; exp. Lyons, Amb. 89; 2 Steph. Com. 205). By sec 147 of the Consolidation Act, all powers vested in any bankrupt, which he might legally execute for his own benefit (except the right of presentation to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same (2 Steph. Com. 205; Doe v. Brittain, 2 Barn. and Ald. 94; 6 Madd. 264).

Rights of action.—The subject of what rights of action pass to the assignees has been fully discussed in two recent cases in the House of Lords (Rogers v. Spence, 12 Cl. & Fin. 701; Beckham v. Drake, 2 H. of Lord's Cas. 579). In the latter case the judgment of the Court of Exchequer was reversed by the Exchequer Chamber (see 8 M. & W. 856, and 11 ib. 315), and the House of Lords, Parke, B., having changed the opinion which he had at first given. It was held, that where the bankrupt had entered into agreement to serve for seven years, at fixed wages at three guineas a week, the party making default to pay £500, by way or in nature of specific damages, and he was dismissed before his bankruptcy, the assignees were entitled to sue and not the bankrupt. Wightman, J., thus laid down the general rules: "There are, however, some exceptions to the generality of the right of the assignees. In cases where the personal estate is only affected through some wrong or injury to the person or the feelings of the bankrupt, and the loss or gain to the personal estate would be greater or less, according to the compensation given for such injury, whether by breach of contract or otherwise, the right of action would not pass to the assignees. Rights of action for breach of promise to marry, for torts to the person, for libel or slander, are instances of exceptions to the general rule. It may be also that the right to enforce unexecuted contracts will only pass to the assignees in cases where the assignees themselves could perform that which the bankrupt himself was to perform, as held in the case of Gibson v. Carruthers (8 Mee. & W. 321). Cresswell, J., thus expressed his view: "It has been decided (see Rogers v. Spence, 13 M. and W. 571; 12 Cl. and Fin. 701), that the rights of action for trespass to land or goods in the actual possession of a trader do not pass to his assignees if he becomes bankrupt, because those rights of action are given in respect of the immediate and present violation of the possession of the bankrupt independently of his rights of property, and are an extension of the protection given to his person, and

the primary personal injury to the bankrupt is the principal and essential cause of action. On the one hand, therefore, we have it established, that, by the bankrupt laws, it was intended that every right vested in the bankrupt of which profit could be made, including rights of action, should pass to the assignees; and on the other, that the right to recover a satisfaction in damages, for a personal injury, is to be excepted out of that general rule." In the opinion delivered by Parke, B., the following passage occurs: "Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignees, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this. On the other hand, rights of action for injuries to the person or reputation, or the possession of real estate, do not pass. Actions of assault, for example, and for defamation, actions on the case for misfeasance, doing damage to the person, for trespass *quare clausum fregit* (Rogers v. Spence, 13 Mee. and W. 571, affirmed, in error, in the Exchequer Chamber and Dom. Proc.), actions for criminal conversation with the wife, for seduction of the servant or daughter of the bankrupt, are not transferred to the assignee, even though some of these causes of action may be followed by a consequential diminution of the personal estate, as where by reason of a personal injury a man has been put to expense, or has been prevented from earning wages or subsistence, or where by the seduction the plaintiff has been put to expense (Howard v. Crowther, 8 Mee. and W. 601). So with respect to contracts; rights of action for the breach of such as directly affect the personal estate, whereby the assignee is prevented from receiving part of it, or its value is diminished, are certainly transferred. For example, rights of action on a beneficial contract, whereby one engaged to sell and deliver goods to the bankrupt, and which, if performed, would have put him in the possession of the goods; or a contract with another to carry or take care of the goods of the bankrupt, which are lost or injured, and thereby diminished in value. On the other hand, actions for the breach of contracts personal to the bankrupt, unaccompanied by an injury to the personal estate—as a contract to carry him in safety, to cure his person of a wound or disease, or a contract with a person, who subsequently becomes bankrupt, to marry—are certainly not assigned." And the reason given by Williams, J., and approved of by Cresswell, J., for the distinctions thus established was, "that it would be attended with extremely harsh and unjust consequences, if the discretion as to whether a redress for wrongs of a personal nature

should be sought, were entrusted to any one but the very person who has received the injury." Lord Campbell, after referring to Parke, B., having changed his opinion, because he had in the first instance disregarded the circumstance of the penalty, said, "There are a few words of Mr. Justice Maule which seem to me to put the case with great strength, and which show how far the principle upon which the learned judges proceed may be carried. He says, 'although a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the assignees, I conceive that a right to a sum of money, whether ascertained or not, expressly agreed to be paid in the event of failing to marry or to cure, would pass.' If for not marrying or for not curing, there being a penalty, and that penalty being forfeited, and being recoverable before the bankruptcy, where it is clearly and exclusively personal to the bankrupt—if even in that case the right of action would pass to the assignees, and would not remain to the bankrupt after his bankruptcy, it is quite clear that the right of action in the present case is transferred from the bankrupt to the assignees. As to the 8 & 9 Will. 3, c. 11, although that prevents the party recovering, as he might have done, at common law, the whole of the penalty, still it does not at all prevent that part of the penalty which is recovered being considered in the nature of a debt; and so much is it a debt, that an action of debt might be maintained for it." So where a trader, in consideration of a sum payable by instalments, agreed to take ten persons into partnership, and became bankrupt, the instalments thereafter becoming due passed to the assignees (Akhurst v. Jackson, 1 Swanst. 185). But accommodation bills in the hands of the party for whose accommodation they were accepted or drawn, will not, and a trader may indorse and pay away such bill, for value, after an act of bankruptcy (Wallace v. Hardacre, 1 Camp. 46). And as the contract of the drawer of an accommodation bill with the acceptor is to indemnify him against the bill, if the drawer provides the acceptor with funds to meet the bill, this is, in law, a performance of the contract, and confers on the acceptor a right to retain the money, not merely against any revocation by the drawer, but also against his assignees in the event of his becoming bankrupt before the bill is paid (Yates v. Hoppe, 19 L. J. 180, C. P.). Where the bankrupt, after having committed an act of bankruptcy, left his business to be carried on by his servant, who received various sums on his account, some for shop goods sold by him after the act of bankruptcy, and the residue from debtors to the bankrupt, and also made various payments to carry on the business; he was held liable to refund to the assignees all the

monies received, and not entitled to take credit for any of the payments (*Kynaston v. Crouch*, 14 M. and W. 266). In that case the defendant had omitted to plead the protection conferred by 2 & 3 Vic. c. 29, and the decision was based therefore upon the general law of relationship to the act of bankruptcy, and would therefore apply to a case where there was notice of the act of bankruptcy. See other instances of actions for damages (*Wright v. Fairfield*, 2 B. and Ad. 727; *Hancock v. Coffin*, 8 Bing. 358; *Porter v. Vorley*, 9 Bing. 98). The assignees are to have the like remedy as the bankrupt, and if he must have joined his wife she must still be a party (*Sherrington v. Yates*, 12 M. and W. 855).

Possibilities.—Any possibility of interest, to which the bankrupt is entitled, prior to obtaining his certificate, in his own right, and of which he may dispose, is distributable; there must, however, be a *personâ designata* to make a possibility distributable; therefore the expectancy of an heir presumptive or apparent does not pass (18 Ves. 435; *Henley's Bankr.* 229, 230, 3rd edit.; 3 Meriv. 671). The word *possibility* is not, however, in the Consolidation Act.

NOTICES OF NEW BOOKS.

PRIDEAUX'S CONVEYANCING.

Precedents in Conveyancing, with Dissertations on its Law and Practice. By FREDERICK PRIDEAUX, Esq., Barrister-at-Law. Second edition. London: Wildy and Sons.

WE have on a former occasion referred to some of the standard works on conveyancing, and we have now to introduce the new edition of Mr. Prideaux's "*Precedents in Conveyancing*" to the attention of our readers. To those who are acquainted with the first edition this new issue will at once suggest by its size that some additional matter has been furnished by the author, and a closer inspection will confirm this first impression. There is no doubt that a good work containing precedents and such practical matter as solicitors stand in need of in the hurry of business, must be serviceable, and, we may add, would be greatly appreciated by the profession. We almost fear that Mr. Prideaux's Dissertations are not of that practical nature for which solicitors look, and, whilst admitting their general accuracy, it appears to us that he has occasionally expressed himself in such a manner that a hasty reader may easily misconceive his meaning. Our extracts hereafter given will furnish an example of this; and we may also refer to pp. 7 and 8, where it is correctly enough stated that, though a vendor may not have the original wills, &c., yet if the conditions are

silent on the subject, he must furnish the purchaser with office copies, &c., it is added, "the vendor cannot impose on the purchaser the obligation of getting such documents."

There are upwards of 150 forms in the book, embracing the following subjects, viz.: Conditions of Sale—Agreements—Purchase Deeds—Mortgages—Transfer of Mortgages, &c.—Bills of Sale—Leases—Covenants for Production—Appointments of New Trustees—Disentailing Assurances—Bonds—Releases and Indemnities—Partition—Annuity Deeds—Copartnership Deeds—Composition Deeds—Settlements—Wills—Disclaimers—Declarations of Trust—Memorials—Notices—Powers of Attorney—Warrants of Attorney—Miscellaneous Deeds.

The Dissertations are upon the following subjects, viz.: 1. On Conditions of Sale; 2. On Agreements; 3. On Purchase Deeds; 4. On Searches for Incumbrances; 5. On the Disposition of the Property of Bankrupts and Insolvents; 6. On the Law relating to Husband and Wife; 7. On Mortgages; 8. On Bills of Sale; 9. On Leases; 10. On Disentailing Assurances; 11. On Composition Deeds; 12. On Trustees, their Estates, Powers, and Duties; 13. On Settlements; 14. On Wills; 15. On Memorials.

So far as we have been able to judge from a cursory examination of the *Precedents*, they appear to be very useful, and such as the practitioner may easily mould and adapt to the circumstances of cases occurring in practice. We are, indeed, inclined to think that the *Precedents* are the better, as they certainly are the larger, portion of the work. Mr. Prideaux has had his Dissertations set up in very large type, and widely leaded, so as to give an outward appearance of the volume containing much more matter than it really does. Thus, by way of furnishing our readers with an example, we may mention that the extracts presently given from the Dissertations, which occupy less than a page and a half of our publication, fill rather more than five pages of Mr. Prideaux's work. We merely mention this, because at first sight the purchaser would be apt to think he was to obtain more for his money than on closely examining the volume will be found to be the case. On the other hand, it makes the work, clearer for reading, and the volume is published at a very low price, which will be a very considerable recommendation for it. And we must say that it is altogether superior to some other conveyancing books, such as "*Jones' Pocket Book*" and "*Crabb's Precedents*," which are, however, much in vogue, though we trust that Mr. Prideaux's volume will be found to supersede them.

The following extracts which are respectively taken from the portions relating to "*Purchase Deeds*" and "*Settlements*" will give the reader a

better notion of Mr. Prideaux's labours than any statements of ours could do:—

"Preparation of deed—Recitals.—The recitals in a purchase deed should be as few and simple as possible. If the vendor is seised in fee it is unnecessary to recite the conveyance to himself, but it is sufficient if the operative part is preceeded by a simple recital of the contract for sale. If, however, the property was conveyed to the vendor to uses to bar dower, and it is intended that he should exercise the power, the conveyance to the vendor must be recited for the purpose of mentioning the power which is intended to be executed. So also if the vendor is a trustee for sale, the instrument by which that trust is created should be recited, and it must also be shown by the recitals that the vendor has proceeded in the mode of sale in compliance with the trusts reposed in him; as, for instance, if the trust was for the sale of the land, either by private contract or public auction, and the property had been sold by auction, the deed of conveyance should contain a recital to the effect that the property had been sold by public auction; whereas, if the vendor had been beneficially seised in fee, any reference to the sale *by auction* would be useless and objectionable. The recitals which a purchase-deed should contain must depend on the particular circumstances of each case, so that it may be sufficient to have given two or three leading illustrations in exemplification of the general principle to be followed. Should the property be subject to incumbrances which are to be discharged, the purchase-deed should explicitly recite the nature and extent of these charges, and the previous documents must be recited so far as to show the actual condition of the title at the date of the purchase; and it may be stated in general terms that no person should be made a party without its appearing for what purpose he joins in the deed.

"Dower of widow, how defeated.—If the purchaser is single, or has been married since the first of January, 1834, it is sufficient to convey the land unto and to the use of the purchaser directly, accompanied with a simple declaration that his widow shall not be entitled to dower out of the premises. There is an advantage in limiting the property to such uses as the purchaser may appoint, and subject thereto to him in fee, as that form of limitation would enable him to make an effectual conveyance to a future purchaser by appointment alone. An appointment is useful in protecting a purchaser without notice from certain incumbrances, such as judgments, which might be created as against the vendor between the limitation of the power and the date of the appointment. An appointment in fee would effectually defeat the dower of the wife, although independently

of such appointment she might have been dowerable (*Ray v. Pung*, 5 B. and A. 561).

"Form of covenants for title.—Covenants for title are generally limited to the acts, &c., of the last purchaser (2 Sug. V. and P. 450, 10th edit.). If, for instance, the vendor was a *bonâ fide* purchaser for a valuable consideration, the covenants would only extend to the acts of himself, but if he derived the property through a purchaser for value by descent, then the covenants would extend to the acts of the deceased purchaser as well as to his own acts.

"Covenants entered into by trustees.—Trustees or other persons not beneficially entitled to the land enter into no other covenant than that they have done no act to incumber the property.

"Operation of covenants for title.—Covenants for title, in order to run with the land, ought to be entered into with the seisinnee to uses (Sug. Conc. V. and P. 437); and it is said 'restrictive words which are inserted in the first of several covenants having the same object will be construed as extending to all the covenants, although they are distinct' (Sug. Conc. V. and P. 465).

"Covenant for further assurance.—Under the covenant for further assurance, the purchaser cannot require a covenant for the production of title deeds (*Hallet v. Middleton*, 1 Russ. 243). A covenant entered into by a purchaser for himself, his heirs and assigns, not to use the land in a particular manner, as, for instance, not to build thereon, is good and binding, and equity would restrain him, and every purchaser from him *with notice* of such a covenant, from using the land for any purpose which would be a breach of the covenant (*Mann v. Stephens*, 15 Sim. 377; *Tulk v. Moxhay*, 2 Phil. 774; 11 Beav. 571).

"Provisions which settlements should contain.—The provisions which should be introduced into settlements will depend in great measure on the nature and description of the property to be made the subject of trust, and on the objects intended to be effected and provided for. The difference between the construction of limitations in settlements and testamentary documents must be carefully borne in mind, and the deed should be prepared accordingly.

"Where the property is personal estate.—If the property to be settled is personal estate, the draftsman must provide for the investment of the trust funds and the change of the securities from time to time, and for the application of the income and the division of the trust funds amongst the objects for whom they are primarily intended, and for the destination of the property in default of such objects. The time for the vesting the *corpus* of the funds must be unmistakeably defined, and the deed must contain all proper provisions for the maintenance of minors, for

the accumulation of the surplus income, and for advancement, for making the receipts of trustees sufficient discharges, and for the appointment of new trustees from time to time, in the place of retiring, incompetent, or deceased trustees, and for their indemnity, &c.

"Where the property is real estate.—If the property to be comprised in the settlement be freeholds, copyholds, or leaseholds, besides the provisions which are equally applicable to settlements of real and personal estate, the trustees must be provided with powers applicable to the character of the particular property, such as powers of leasing for twenty-one years, and of granting building and mining leases, powers of sale and exchange, powers of felling timber and partitioning when necessary, provisions as to the application of the rents and profits during minorities, and powers for the payment of ground rents, for the renewal of leases, and for the enfranchisement of copyholds, &c., and in preparing all the limitations and provisions due attention must be paid to the nature of the respective properties, and the rules of law and construction which govern each.

"Rule against perpetuities.—Whether the settlement relates to real or personal estate, the fact must not be lost sight of that our law abhors a perpetuity, and that it will frustrate every attempt to keep the property fettered beyond a life or lives in being, and twenty-one years afterwards.

"Settlements of property of infants.—The 18 & 19 Vic. c. 48, ss. 1, 3, authorises infants in contemplation of marriage, with the sanction of the Court of Chancery, to be given on petition without the institution of a suit (if males, at any time after the age of twenty, and if females, at any time after the age of seventeen), to make binding settlements of all or any part of their real or personal property, or property over which they may have any power of appointments. But as to appointments under a power, or any disentailing assurance which may have been executed by the infant tenant in tail under the provisions of the act, it is provided that in case the infant dies under twenty-one, such appointment or disentailing assurance shall be absolutely void (sec. 2)."

On the whole, we conceive that Mr. Prideaux has produced a work which will become a standard one among solicitors, and of which we doubt not other editions will hereafter be required, when the same learning which has been bestowed on this present edition will be applied to make a still more satisfactory work.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ANNUITY.—*Insurance of life by grantee*—On redemption grantee not entitled to.—Where the grantee of an annuity, insured the lives for which the annuity was granted, without there being any stipulation on the subject between him and the grantor: Held, that the latter on redeeming, had no right to have the policy delivered to him. *Lancaster, ex parte*, 4 De Gex. and S. 524.

FEME COVERT.—*Fines and Recoveries Act* [vol. 1, pp. 839, 872, 447]—*Order under section 10*.—Order granted under sec. 10 of the Fines and Recoveries Act for a married woman to execute a conveyance without the concurrence of her husband, where she was married at Marseilles, in 1854, to a foreigner, and lived with him about a year, when he was imprisoned by the French authorities for cruelty to her, he now residing in Marseilles, and she in this country, maintaining herself without any assistance from him, and it not appearing that he had refused to execute the conveyance. *In re Alberici*, Week. Rep. 1855-6, p. 208.

INSOLVENT.—*Right to sue in respect of property disposed of by his assignee*—*Judgment in Rochfort v. Battersby* (2 House of Lord's Cas. 388) observed upon.—According to V. C. Stuart in the following case there is nothing to justify the general proposition which is to be found laid down in some books that an insolvent, or person claiming under an insolvent, is not entitled to sue in a court of equity (see 1 Chron. 448) in respect of any property which, under such insolvency, has become vested in the official assignee, until a revesting order has been obtained. Reference is usually made to the case of *Rochfort v. Battersbee* (*supra*), the grounds of the decision in which case, as well as the decision itself, have been much misapprehended. In that case there was no admitted surplus. In the case presently noticed a surplus existed, and whenever such is the fact, there is virtually an end of the insolvency. By the very admission of a surplus, the assignee acknowledges that the same is not the property of the Insolvent Court, but of the ex-insolvent. There is nothing in the judgment in that case of *Rochfort v. Battersbee* (*supra*), which goes to the length of saying that, when the assignee in insolvency has actually admitted his possession of a surplus, the no longer insolvent is to be debarred from maintaining a suit in a court of equity. Lord Cottenham, indeed, (2 House Lords case, pp. 409), makes use of the following words: "A demurrer is held to be good to a bill filed by an insolvent debtor, though he alleges a probable surplus;" and a cursory reading, without a careful discrimination of the principle involved and

the language in which the judgment is couched, might lead to be a very mistaken conclusion. His lordship was dealing with the case of an insolvent who had only a "probable surplus." "The moment you show," he proceeds, that he has no recognised interest in the property there is an end of his competency to raise the question." On this distinction V. C. Stuart has decided that an insolvent, whose surplus is admitted, has a recognised interest in the same and is virtually no longer insolvent; and is not debarred, upon principle, from bringing his suit in equity, in respect of any dealings with his estate by his assignee. *Wearing v. Ellis*, Week. Rep. 1855-6, p. 215.

JUDGMENT.—*Fraud and collusion, treating judgment as nullity—How judgment of lords set aside—Inferior court no jurisdiction.*—Where a judgment has been obtained by fraud, and more especially by the collusion of both parties, such judgment, although confirmed by the House of Lords, may, in an inferior tribunal, be treated as a nullity. But the allegations of fraud and collusion must be specific, pointed, and relevant, otherwise they cannot be admitted to proof. To set aside a judgment obtained by fraud, the proper course, when such judgment has been confirmed by the House of Lords, is to apply to the House of Lords. Hence it is wrong to ask a court below, upon proof of the fraud or collusion, to set aside a judgment confirmed by the House of Lords. *Shedden v. Patrick*, 1 Macq. H. L. Ca. 535:

EQUITY PRACTICE.

ADMINISTRATION ORDER [vol. 1, pp. 54, 262, 408]—*Summons—Administration—20th order of the 16th October, 1852—Further inquiries as to leases, &c.*—Where, after an order has been made for the administration of assets, a summons was taken out for the purpose of obtaining an inquiry, to be added to the order, as to whether a trustee had granted leases of the testator's estates, in accordance with the trusts of the will, and other inquiries, the court held, that under the 20th order of October, 1852, it was not necessary that the suitor who suggested an additional inquiry should fortify the summons by evidence in a formal way, to be met by evidence against the matter sought by the summons; but that inasmuch as without formal pleadings a suitor might have an estate administered upon any reasonable suggestion which would justify the inquiry, or any fact reasonably apparent, without the expense of formal evidence, and of discussing the same, the judge had ample power to direct any further accounts and inquiries which might seem to be necessary. In a case where it was suggested that the leasehold estates had been let at rents less than those

taken in the testator's lifetime, it was held that the better course would have been, not to have had a discussion upon affidavits or evidence as to whether there should be any further inquiry, but that the court should have called upon the trustee to give an account of the circumstances attending the granting of the leases. *Mutter v. Hudson, Hurford v. Hudson*, 1 Jur. N. S. p. 84.

PARTIES TO SUITS [vol. 1, pp. 30, 60, 125, 306, 332, 376, 416].—*Demurrer—Effect of previous agreement not to sue—Fraud.*—A party cannot protect himself from being made a co-defendant to a suit, in which fraudulent misconduct upon his part is alleged, upon the mere ground of an agreement between himself and the plaintiff, anterior to the acts complained of, that he should not be made a party to, or required to answer, any suit at law or in equity in respect of anything done or omitted to be done by him in the performance of certain duties to his neglect of which the charge of misconduct refers. Nor can he object in such case that the bill does not pray any active relief as against himself. *Scott v. Corporation of Liverpool*, Week. Rep. 1855-6, p. 210.

COMMON LAW.

ACCOUNT STATED [vol. 1, pp. 69—71, 171].—*What amounts to—Showing a specific item due.*—A plaintiff cannot recover on an account stated, without showing some item, to a specific amount, agreed upon as due, though a single item would be sufficient. The plaintiff, to prove an account stated, gave in evidence a letter which the defendant wrote to the plaintiff: "Oblige me by holding my cheque till Monday, and in the interim I will send you the amount in cash." The cheque being post-dated could not be read as evidence, and there was no further evidence of the amount admitted by the defendant to be due: Held, by Lord Campbell, C. J., Wightman and Crompton, JJ., that the plaintiff could not recover even nominal damages. But by Erle J.: that nominal damages might be given; the letter showing that a definite sum had been arrived at in account, though the amount could not be proved. *Jane v. Hill*, 18 Qu. Ben. Rep. 252; 21 Law Journ. Q. B., 318.

ACTION: NOTICE OF [vol. 1 p. 434].—*Ignorance by defendant of existence of statute—Acting in pursuance of statute—Notice of action—When necessary, generally—Bonâ fide.*—When a statute throws a protection round persons sued for anything done in pursuance of it, the question for the jury is, whether the defendant acted under the bonâ fide belief that in doing the act, he was acting in pursuance of the statute, and had reasonable grounds

for that belief. When a party to a suit sets up as his defence the enactments of a statute, it is no answer to his defence to show, even by his own testimony, that at the time of doing the act complained of, he was ignorant of the existence of the statute. The Metropolitan Police Act, 2 & 3 Vic. c. 47, having created several acts misdemeanours, inflicts a penalty, on summary conviction, on various other offences, and among them the laying of shells in a thoroughfare. It likewise enacts, that any person found committing any offence punishable either upon indictment or as a misdemeanour upon summary conviction by virtue of the act, may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and detained until he can be delivered to a constable; and notice in writing must be given of all actions against any person for anything done in pursuance of the act. A person employed by the owner to keep clean a thoroughfare, finding that another person was in the habit of laying oyster-shells upon it, consulted an inspector of police, and by his advice gave that party into custody. An action having been brought: Held, first, that the defendant was entitled to notice of action, this being an act done in pursuance of the statute: Held, secondly, that evidence was receivable of the defendant having asked the advice of the police inspector, and of the advice given him by the latter. *Danvers v. Morgan*, 1 Jur., N. S., 1061; Week Rep. 1855-6, p. 21.

BILL OF EXCHANGE.—*Retiring from circulation—Different meanings of.*—The word retire, in reference to a bill of exchange, is susceptible of various meanings according as it is applied to various circumstances; if the acceptor retires the bill at maturity, he takes it entirely from circulation, and it is in effect paid; but if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold it with the same remedies as he would have had if he had been called upon in due course, and had paid the amount to his immediate indorsee, and this latter is the ordinary meaning of the word "retire." *Elson v. Denny*, 15 Com. Ben. 87.

BILL OF EXCHANGE.—*Remitted for sale—Proceeds to be applied to a specific purpose—Property remaining in remitter.*—Where bills of exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And where the money realized by the sale was wrongfully applied by the agent: Held, that the remitter was entitled to recover the value of the bills from the purchaser of them, who had notice of the purpose for which

they were remitted, and the misapplication of the proceeds by the agent. *Muttyloll Seal v. Dent*, 8 E. F. Moo. 319.

CHEQUES CROSSED.—*Custom—Liability of party who cashes it—Bona fides—Due caution.*—The crossing of a cheque payable to bearer with the name of a banker, whether made by the drawer or the bearer, does not affect or restrain the negotiability of the cheque, the only effect of it is to throw upon the person who cashes it the duty of shewing that he took it *bona fide* and gave consideration for it, because it does not cast upon him the responsibility of inquiring into the title of the owner. Therefore, in an action for the conversion of the cheque, to which the defendant pleaded that the cheque was not the property of the plaintiffs, where it appeared that the drawer of the cheque, having crossed it with the words "and Co.," sent it to the plaintiffs, who added in the crossing the names of their own bankers, and gave it to a clerk to be paid in to their bankers, and the clerk, instead of paying it to their bankers, applied to the defendant to cash it, which he did; the custom as to crossing cheques being admitted to be stated in *Bellamy v. Marjoribanks* (7 Exch. 389, 403; 16 Jur. 106, 108),—Held, that the question for the jury was, whether the defendant took the cheque *bona fide*, and for value; and if so, he was entitled to retain it. *Carlou v. Ireland*, 1 Jur. N. S. 40; Week Rep. 1855-6, p. 200; 26 Law Tim. Rep. 195.

FRIENDLY SOCIETIES [vol. 1, pp. 17, 68, 184, 455; ante, pp. 136—189].—*Industrial and Provident Societies Act, 1852, 15 & 16 Vic. c. 81, 17 & 18 Vic. c. 25, s. 1—Action.*—The 1st section of 17 & 18 Vic. c. 25, provides that after the passing of that act, "no suit or proceeding shall be commenced or prosecuted against the trustees of any society registered under the Industrial and Provident Societies Act, 1852, except in the case thereafter provided; but all suits and proceedings—whether at law or in equity, or by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such society—against such society shall be commenced and prosecuted against the officers to be appointed as thereafter provided on behalf of such society, or if there shall be no such officer for the time being, then against the trustees of such society." Since the above act no action can be brought against a member of a society registered under the Industrial and Provident Societies Act, 1852, where at common law the society itself, or all its members, might have been sued; and such action must be brought against the officers of the society appointed under the first mentioned statute. *Burton v. Tannahill*, Week. Rep. 1855-6, 205.

PUBLIC COMPANY.—*Execution against shareholders*—*Sci. fa.*—8 & 9 Vic. c. 16, s. 36—[vol. 1, pp. 243, 275, 309, 345, 410].—The 8 & 9 Vic. c. 16, s. 36, renders all the shareholders in a company against the effects of which execution has issued, and wherein there has not been found sufficient to levy, who were such at the return of the writ, liable to execution against them individually to the amount of their shares. It is, therefore, no answer to a declaration on a *scire facias* against such shareholder that he assigned his shares after the motion in open court, and before the issuing of the *scire facias*. *Nixon v. Green*, Week. Rep. 1855-6, p. 209.

SHIPPING.—*Merchant Shipping Act*—*Value of ship, how to be ascertained* [vol. 1. pp. 160, 243, 340].—In determining the amount of liability of a shipowner under 17 & 18 Vic. c. 104, s. 504,—which provides that, in case of the loss of his ship, he shall not be liable in damages beyond the value of his ship and freight—the value of a ship must, except in the case of a ship bought for a particular purpose, be taken to be the saleable value at the time of the loss, as estimated by a competent valuer selected by both parties. *African Steam Ship Company v. Scansy*, Week. Rep. 1855-6, p. 210.

COMMON LAW PRACTICE.

AFFIDAVITS.—*Exhibits.*—A commissioner before whom an affidavit is sworn, ought to certify that any exhibit annexed is the document referred to in the affidavit. *Alison, In re*, 10 Exch. 561.

ARBITRATION.—*Special case stated by arbitrator.*—We have seen (vol. 1, p. 157), that by the 17 & 18 Vic. c. 125, s. 5, that an arbitrator may state his award in the form of a case, for the opinion of the court, and we may now state that in such a special case, the arbitrator must state whether the arbitration is under a compulsory reference under the act, or whether it is upon a reference by consent of the parties where the submission has been or is to be made a rule or order of one of the superior courts of law or equity. In the former case the award must be intitled in the court and cause, and the rule or order of the court must be set forth. In the latter case the terms of the reference relating to the submission being made a rule or order of court must be set forth. Reg. Gen. M. Vac., 1854; 14 C. B. 178; 10 Exch. 403; 4 El. and Bl. 368.

VENUE.—[vol. 1, pp. 50, 51].—*Changing by amendment*—*Imposing terms.*—Where a plaintiff is entitled to amend his declaration, by changing the venue, as a matter of right, the court will not, at the instance of the defendant, impose terms. *Turnley v. London and North Western Railway Company*, 16 Com. Ben. 575.

CRIMINAL LAW

HIGHWAYS [vol. 1. pp. 17, 94, 382, 422, 455].—*Highway rate, title of*—*Costs of defending indictment* [vol. 1, pp. 94, 95].—It is not necessary to show on the face of a rate jurisdiction to make it. By section 29 of the 5 & 6 Will. 4, c. 50, with reference to ordinary rates, it is provided that no rate to be assessed at one time shall exceed tenpence in the pound, or two shillings and sixpence in the pound on the whole of any one year. By section 111, however, where the inhabitants of a parish agree to defend an indictment found against the parish, and the ordinary rates are insufficient to meet the expences incurred, an additional rate may be made and levied, to which no limit is assigned. It has been decided that a single rate exceeding tenpence in the pound, made under the 111th section of the General Highway Act, 5 & 6 Wm. 4, c. 50, as an additional rate to defray the expenses of defending an indictment, need not show by its title that it is such additional rate. *Regina v. Uttermere*, Week Rep. 1855-6, p. 205; 26 Law Tim. Rep. 197.

SALMON FISHERY.—*Conviction for unlawful salmon fishing*—*What is a setting of nets within 1 Geo. 1, st. 2, c. 18, s. 14*—*Costs to informer*—11 & 12 Vic. c. 43, ss. 18 & 36—*Destruction of nets.*—By 1 Geo. 1, st. 2, c. 18, s. 14, it is enacted, that if any person shall make, erect, or set any bank, dam, or hedge net or nets, across certain rivers whereby the salmon therein may be hindered from passing up the river to spawn, he shall forfeit the sum of £5, besides the fish taken and the nets used in committing the said offence; half to go to the informer, and half to the poor of the parish where the offence is committed:—Held, that under this act a person may be convicted for setting a net with intent to prevent salmon going up the river to spawn, although he may not have fixed the net permanently by stakes or otherwise to the ground:—Held, also, that though the offence be committed partly in one township and partly in another, the conviction is good which states the offence to have been committed in one of the townships only:—Held, also, that the justices had power to award costs to the informer by the conviction in addition to the penalty, the 18 Geo. 3, c. 19, ss. 1, 2, being repealed by 11 & 12 Vic. c. 47, s. 36:—Held, also, that under the 1 Geo. 1, st. 2, c. 18, s. 14, the conviction is not bad for not ordering the net used in committing the offence to be immediately destroyed in the presence of the convicting justices:—Held, also, that when the place where the offence is committed is a township maintaining its own poor, such township may be considered to be a parish within the act, and entitled to half the penalty; and that the venue was right in describing the offence to have

been committed in the township of W. *Same v. Sharples*, Week Rep. 1855-6, p. 207; 26 Law Tim. Rep. 198.

BANKRUPTCY AND INSOLVENCY.

CERTIFICATE.—*General principles relating to granting and withholding—Falsehood and dishonesty.*—In the following case the Court of Appeal in Chancery considered and stated the principles of the court in reference to granting or withholding certificates to bankrupts, viz., that in certificate cases the interests of society are to be looked to, and the court will often with a view to the public interest inflict upon a bankrupt a penalty more severe than the case would require if looked at with a view merely to the interest of the parties immediately concerned. *Per Sir J. L. Knight Bruce, L. J.*: If a bankrupt is shewn to have been negligent, careless, rash, or improvident in his affairs, or extravagant in his expenditure, those circumstances are of importance on the question whether any certificate is to be granted, and of what class, but, *semble*, a certificate will never be granted to a bankrupt who is shewn to have been guilty of wilful falsehood or dishonesty in reference to his creditors or his affairs. *Ex parte Dobson, In re Strong*, 1 Jur. N. S. p. 56.

EXAMINATION QUESTIONS.

(Hilary Term, 1856).

PRELIMINARY.

1. Where, and with whom, did you serve your clerkship? 2. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. 3. Mention some of the principal law books which you have read and studied. 4. Have you attended any, and what, law lectures?

COMMON LAW.

I. Where a party has a lien on goods or title deeds as a security for a debt, and such debt becomes barred by the Statute of Limitations, does the lien continue, or is it at an end? II. How should a sheriff proceed, if, after having levied an execution against the effects of a defendant, notices are served upon him that the goods are claimed by others? III. Can the landlord of a house distrain the goods of a lodger for rent due from his own tenant? IV. When a verdict has been set aside and a new trial granted, and previously to the first trial the usual notice to inspect and admit documents has been given, and an order for admission made, is it necessary that fresh notice to inspect should be given, and a fresh order for admission be obtained in respect of the same

documents upon the second trial? V. What is a sequestration as applicable to the recovery of a debt? under what circumstances, and by whom is it issued? and to what species of property does it apply? VI. In an action brought under 18 & 19 Vic. c. 87 (the Act to facilitate the Remedies on Bills of Exchange and Promissory Notes by the prevention of frivolous or fictitious defences to actions thereon) against the acceptor of a bill of exchange, who has not paid the bill when due, can the defendant appear and plead as in other actions, and if not what steps must he take to enable him to do so? VII. A plaintiff or defendant having obtained a verdict out of term, how soon afterwards may he issue execution? VIII. The venue in a cause being laid in the county of Surrey, and the plaintiff having obtained final judgment against the defendant, and being desirous to issue an execution against the defendant's effects in Norfolk, can he or can he not issue a *fiery facias* at once into the latter county although the venue in the action is laid in Surrey? IX. In an action against a *feme covert*, can she enter an appearance by attorney, and if she plead coverture and obtain a verdict on the plea, is she entitled to the same costs as any other defendant obtaining a verdict is entitled to, or to any, and what costs? X. If an attorney, as attorney for a defendant, give an undertaking to appear for him, and then omit to do so, are there any means which can be pursued to compel him to fulfil his undertaking, and what are they? XI. A warrant of attorney to confess a judgment for £1,000 having been given by two parties jointly (and not jointly and severally), one of them dies before judgment entered up; can the party to whom the warrant of attorney was given enter up judgment against the survivor? XII. What is the difference between an action of detinue and trover? XIII. If the acceptor of a bill of exchange refuse payment of it when due, is any, and what, step necessary before the holder can sue the drawer or indorser? XIV. When a contract is not under seal and is made by a party acting as agent for another, may the person for whose benefit the contract is made, sue thereon? or must the action be brought in the name of the agent who made the contract? XV. If a sheriff remove goods seized by him under an execution against the effects of a tenant, after notice that half-a-year's rent is due to the landlord, without provision being made for payment of the rent,—has the landlord any, and what, remedy against the Sheriff?

CONVEYANCING.

I. Owner of freeholds and copyholds dies intestate and without heirs, who becomes entitled to the respective estates? II. Give concisely the words

by which an estate in tail male, an estate in tail general, and an estate in tail male special, may respectively be created. III. Conveyance by bargain and sale enrolled, to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs; in whom, under such a conveyance, does the legal estate vest? IV. What are incorporeal hereditaments, and by what kind of assurance are they usually conveyed? V. What is the signification of the term "Emblements," and what persons are entitled to them? VI. A., by will appoints three executors, who all die in his lifetime; who, on A.'s death, is entitled to administer to A.'s will? VII. What is the meaning of the terms "Estoppel" and "Escrow?" VIII. Estates settled to the use of A. for life, remainder to the use of trustees for terms of years to raise jointure and portions remainder to the use of the 1st and other sons of A. successively in tail; who is entitled to the immediate custody of the title-deeds? IX. Can a person legally present himself to a living, the next presentation to which he has purchased either in his own name, or in the name of a trustee? If not, why not? X. What, if anything, is necessary to be done to make a bill of sale of chattels good, and under what law or regulation? XI. State concisely what provisos, covenants, and powers, are usually inserted in mortgages in fee of freehold estates. XII. Is there any relation in which persons may stand with reference to each other which forbids a purchase by either of them from the other? State instances of such relation. XIII. A., seised in fee, sells to B. in fee; what covenants for title are inserted in the conveyance? If A. were a trustee only for sale, without having a beneficial interest, would the same covenants be inserted, and if not what other covenants? XIV. A person devises his real estate to his heir at law; does such heir take the estate by devise or descent? By what law or usage is this matter governed? XV. A., B., and C., are joint tenants of Black Acre, tenants in common of White Acre, and tenants in coparcenary of Green Acre; B. dies, leaving A. and C. living; Who on B.'s death will become entitled to his interest in the estates respectively, and in what proportions?

EQUITY.

I. State some of the principal subjects of equitable jurisdiction. II. In what cases will a court of equity relieve against a forfeiture of a lease for breach of covenant, and is there any, and what, case in which no relief can be afforded? III. In what cases will a court of equity decree the specific performance of a contract relating to land, when the agreement is not in writing? IV. In the case of a tenancy for life, without impeachment of waste,

are there any kinds of waste which the court will restrain? V. In what respect does a tenancy for life, "without impeachment of waste," differ from an estate for life, in the limitation of which those words are omitted? VI. Where it is apprehended that a breach of trust will be committed with regard to stock in the public funds, what steps would you advise in order to prevent any improper dealing with the stock? VII. How is an infant made a ward of court? and what is the effect of it as regards the person and property of the infant? VIII. How can a trustee relieve himself from the performance of his trust? IX. Describe, generally, the several modes of instituting proceedings in the Court of Chancery, and the nature of the cases to which each mode is applicable. X. How is a suit on behalf of an infant or a married woman commenced? and what authority should the solicitor obtain? XI. Describe the principal steps in a cause which has been commenced by bill. XII. State the different modes in which evidence can now be given by a plaintiff in support of his case at the hearing. XIII. What is now the course of proceeding in chancery by a creditor, to obtain payment of his debt, or by a legatee, to enforce payment of his legacy? XIV. When a suit becomes abated by the death of any of the parties, what is the mode of proceeding to revive the suit? XV. What are the matters of relief which must now be sought for by proceedings in the judges' chambers?

BANKRUPTCY.

I. State the principal objects to be effected under the law of bankruptcy. II. How is an adjudication to be obtained? III. What are the facts to be established in evidence by the petitioning creditor? IV. When, and how, can a trader dispute the adjudication against him? V. State the mode of proving debts under an adjudication in bankruptcy. VI. How is the property of a bankrupt vested in the assignees? VII. Give instances of property in the possession of a bankrupt which does not pass to his assignees? VIII. What is deemed a fraudulent preference made in favour of one of the bankrupt's creditors? IX. Are there any, and what, settlements made by a trader before an adjudication which are deemed valid? X. If one of several partners becomes bankrupt what is the effect on the other partners? XI. In what cases, and to what court, may an appeal against the decision of the commissioners in bankruptcy be made? XII. When, how, and by whom, is the certificate of conformity granted to a bankrupt? XIII. What are the general grounds on which a first, second, or third class certificate, is usually granted? XIV. If a certificated bankrupt acquire property after the adjudica-

tion against him, or after his last examination, can he retain it in any, and what, circumstances? XV. Can any, and what, proportion of creditors in number, or value of debts, bind the rest to accept a composition?

CRIMINAL LAW.

I. What are the usual proceedings on a criminal charge up to the time of trial? II. When may the accused be admitted to bail? III. In case of a commitment for murder, can the accused be admitted to bail? IV. Can any, and what defects in an indictment be amended at the trial? V. Is there any, and what, appeal in criminal prosecutions? VI. Describe the offences of larceny and embezzlement. VII. What is a criminal information, and how is it obtained? VIII. What is a writ of mandamus? how, and in what cases, may it be applied for? Describe the necessary proceedings, and how it is to be opposed. IX. Are magistrates responsible for acts done in their official capacity, and are they entitled to any, and what, notice of legal proceedings against them? X. What are the offences which courts of quarter sessions are empowered to try? and what offences may be tried and punished in a summary way by magistrates? XI. What power do magistrates possess in regard to stopping up or altering a public path? XII. On whom is the liability thrown for repairs of highways and public bridges, and are there any, and what, cases of exception? XIII. What property, if any, real or personal of the accused, is forfeited on a conviction for felony, and from what time does the forfeiture take place? XIV. What is the jurisdiction of a magistrate in cases of wilful trespass on, and damage done to land? XV. How can a settlement under the poor law be now obtained? and what is the law with respect to the removal of paupers?

ANSWERS TO MOOT POINTS.

No. 106.—*Sale by Auction—Set-off against price of Goods* (vol. 1, p. xiii, and ante, pp. iii, iv, viii, xii, xv).

This point has been very well argued on the authority of the older cases, but the recent case of *Robinson v. Rutter* (1 Jur. N. S. 823, and 25 Law Tim. Rep. 127) decides the point mooted. The Court of Queen's Bench ruled that an auctioneer is in the same position as a factor who sells goods, having advanced money upon them, and that even a payment to the principal will not affect the auctioneer's right to recover the price of the goods, unless the consent of the auctioneer be shown. —EDG.

No. 21.—*Acknowledgment of Deeds by Married Women* (ante, pp. xiv, xix, xxiii).

As the necessity of acknowledgment by married women of deeds purporting to convey any interest in land, in their right, was under discussion in a recent number of this publication, the result of which was a decision in the affirmative, it may be as well to call the attention of correspondents to the fact, that a recent decision of the Lords Justices of Appeal, reported in the *Times* of the 18th of this month (which may have escaped notice), has carried the point thus much further: that the fact of a married woman being a ward of the court of chancery, does not empower that court to forego the statutory acknowledgment (*Field v. Moore* and *Field v. Brown*, before the Lords Justices of Appeal in Chancery). A. L. T.

No. 38.—*Personal Contracts* (ante, p. 237).

The Court of Chancery would not decree a specific performance of an agreement of this kind, having no means of carrying it into effect (*Bozon v. Farlow*, 1 Mer. 459).

E. R. JAKES (Handsworth).

No. 39.—*Landlords and Tenants* (*Farmer*) (ante, p. 238).

I should think that the farmer would be entitled to reasonable compensation, though everything depends on the custom of the neighbourhood, but custom generally gives to the outgoing tenant a right to remuneration for tillage (see *Woodfall's Landlord and Tenant*, 6th edit. p. 530, *et seq.*). The mooter will there find tillage spoken of to the effect following: "Such a custom is unquestionably valid, and it has, therefore, been held that an usage for the off-going tenant of a farm in a particular district to bestow his work, labour, and expense in manuring, tilling, fallowing, and sowing according to the course of husbandry; and for the landlord to pay him a reasonable compensation in respect thereof is a valid and reasonable custom." It is before stated that this is so "because the benefit derived therefrom is considered to extend to a series of subsequent crops; therefore, in reason this seems to apply with equal force as well to the simple improvements of a farm as to a system of tillage through which the land is enriched, but of course much will depend on the particular custom of the district in which the property in question is situate. I also feel inclined to the idea that the farmer ought of right to be remunerated for his outlay in draining (see *Idem*. 533). It may be well, however, to observe that another reason why tillages are allowed is that the land must of necessity be fallow and unproductive for one year. The mooter does not state whether the dressings of

bones, &c., were applied when the land was fallowed; if so, this would tell (did the custom prevail much in favour of the farmer), though it cannot be denied but that if each farmer were allowed to drain and improve his land as much as he wished, and to receive compensation therefore on his removal, the effect would be in some cases, most mischievous to the landlord. **BONAN CLIFFE.**

No. 40.—Appointment of new trustees.

I cannot agree with Mr. Edwin in his construction of this trustee clause. The proviso in question first anticipates a possible contingency, namely, that "of T. W. T. and J. T., or any trustee to be appointed as thereafter mentioned dying, or being desirous of being discharged, or refusing, or becoming incapable to act," and then proceeds to prescribe the steps to be taken on the happening of such contingency, viz., "that then and so often the said Eliza T. may appoint any other person to be trustee in the stead of the trustee so dying, or desiring to be discharged, or refusing, or becoming incapable to act." It will be observed that the latter, and enabling part of the proviso refers to the contingency as that of "the trustee so dying, &c." This clearly cannot refer to "the trustee to be appointed as thereafter mentioned." The question remains:—Who is the trustee referred to? A satisfactory answer may be found by regard had to the contingency evidently contemplated and intended to be provided for, namely, the death of either of T. W. T. or J. T. And this, I think, is the construction a court of equity would apply, changing this disjunctive "and" between the names of the trustees to the copulative, "or" (in accordance with the evident intention), a contingency being thus created, upon which the enabling part of the proviso will be able to operate. I think, therefore, Mrs. T. has power to appoint a new trustee in the place of the one going to the Crimea.

ARTHUR L. TROTMAN.

No. 43.—Tacking Mortgage (ante, p. 238).

There is not a doubt but that the fact of the same solicitor having been concerned for all parties, will imply constructive notice. Mr. Smith in his *Manual of Equity Jurisprudence* says:—"To constitute constructive notice it is sufficient if it is brought home to the agent, attorney, or counsel in the same transaction or in one immediately preceding," and again "where the mortgagee has at different times employed the same solicitor in effecting different incumbrances upon the same estate, and the incumbrancers have employed the mortgagor's solicitor in the several transactions, each of the puisne incumbrancers is affected with notice of the prior incumbrances" (5th edit. p. 83).

Therefore, in this case the constructive notice of

C.'s mortgage of 1805, prevents B. tacking the mortgage of 1809 to that of 1804.

E. R. JAQUES (Handsworth).

No. 43.—Tacking Mortgage (ante, p. 238).

It is laid down by Sugden (see *Sug. Vendors and Purch.* vol. 1. 7, and vol. 2. 279), and other authorities, that notice to the counsel, attorney, solicitor, or agent of a party is notice to himself: Provided, it be given in the same transaction—which proviso seems to exclude the case in hand from the operation of the rule. In a recent case, however, exactly in point (*Hargreaves v. Rothwell, Bythewood by Jarman*, vol. 5, 489), Lord Langdale held that, in order to exclude the rule, it is not sufficient that the transactions are distinct (as in the present case), they must also be separated by such an interval of time, as to exclude actual or presumed recollection. This decision has been followed, and the case, therefore, stands thus:—If the solicitor should confess a recollection of the mortgage to C., or the interval of time be considered sufficiently short to support a presumption of such recollection, B. having no equality of equity with C. would lose the benefit of his legal estate, and the parties would be in the same position, as if due notice had been actually given—"Quis prior in tempore, potior est in jure."

A. L. TROTMAN.

No. 43.—Tacking Mortgage (ante, p. 238).

I presume B., the first mortgagee, to have had the legal estate; if so, he could tack his subsequent charge of 1809 to his original security of 1804, having no notice of the incumbrance of 1805; but if the mortgages had been equitable merely, and the legal estate outstanding in a third person, the omission of C. to give notice to B. would have conferred no priority on him (B.) in respect to a subsequent charge, but I am doubtful as to the same solicitor having been employed in all three transactions, whether any case has been decided as to this being sufficient notice (*Jarman and Bythewood's Conveyancing*, vol. 5, and *Archbold*, vol. 2).

J. T. B. (Hadleigh).

No. 43.—Tacking Mortgage (ante, p. 238).

In this case, as one and the same solicitor was employed by all parties, the mere fact of his knowing of the mortgage to C. at the time he drew up the second mortgage to B., would I imagine, in equity, be considered a sufficient notice to B., and therefore, C.'s mortgage would take priority over the second mortgage of B. (*Newstead v. Searles*, 1 Atk. 265; *Le Neve v. Le Neve*, 3 Atk. 646; 1 Ves. 64, *Brotherton v. Hall*, 2 Vern. 574; *Ashley v. Baillie*, 2 Ves. 368; *Maddox v. Maddox*, 1 Ves. 61, *Tunstall v. Trappes*, 3 Sim. 301; *Kennedy v. Green*, 3 Myl. and Kee. 699). **HUBERT WOOD (Yeovil).**

MOOT POINTS.

No. 54.—*Matters of Record.*

It is desired to know what documents are termed matters of record—or, in other words, what documents are those which a purchaser cannot require attested copies of.

J. G. B. EDWIN.

No. 55.—*Merger.*

A. is possessed of a leasehold house for a long term, and leases it for 21 years at a rack rent to B. B. afterwards takes an assignment of the term from A. for a valuable consideration. Does B.'s lease for 21 years become extinct, and merge in the larger term? Or is it necessary that a surrender of it should be executed by A.?

J. G. B. EDWIN.

No. 56.—*Sale by Cestui que Trust under Will—Joinder of Trustees.*

A. by his will gave and bequeathed the rents, interest, and profits, of the whole of his estate, both real and personal, unto his wife during her natural life, and after her decease gave the whole of his estate as aforesaid, both real and personal, unto trustees, to hold unto the said trustees and the heirs, executors, and administrators of such survivor of them, upon trust, and from the rents, interests, profits, and yearly proceeds of his said real and personal estate, upon trust, and testator did thereby will and direct that they his said trustees should cause his youngest child (naming her) to receive a suitable education at the discretion of his trustees aforesaid, and the rest and residue of the rents, interests, and profits, as aforesaid should be equally divided amongst all his children (naming them), and when the youngest of his surviving children should attain 21 years (which event happened in the life time of the mother); testator willed and directed that the whole of his estate, both real and personal, and every part thereof as aforesaid, be divided amongst his said children living at that time, their heirs, executors, and administrators, equally, share and share alike, as tenants in common.

One of the children wishes to sell his share—are the trustees necessary parties to the conveyance to a purchaser?

W. M.

No. 57.—*Annexation of Freeholds.*

A. who is tenant of a house (and who is under notice to quit), finding that one of the walls of a room in the house is very damp and likely to be injurious to his health, covers the wall with sheet lead, and then papers over the lead (the room was a papered one). Will A. on quitting the house be entitled to the lead as a moveable fixture? Or, will the lead be considered as annexed to the freehold? See Coote on the Law of Landlord and Tenant p. 235.

G. H. CLOUGH (Workshop).

No. 22 (VOL. II.)

No. 58.—*Conveyance Stamp.*

A. has purchased an estate of B. for £410, which estate is subject to an annuity of £20, to a person aged 64. There are also two mortgages on the estate for £250 and £50, which will be paid out of the purchase-money. What stamp is required for the conveyance?

F. R. S.

No. 59.—*Effect of the Insertion or Non-insertion of a Consideration in a modern Assurance.*

A. in consideration of £20, conveys to B. (without any declaration of uses). Does B. take at the common law, or under the statute? I was at first inclined to think he took at common law, on the ground that the modern conveyance by grant was substituted for the old common law modes of assurance (in which a consideration was unnecessary until the interference of equity, in contradistinction to a covenant to stand seized and bargain and sale, which were the creatures of equity), and therefore, that, though the absence of any consideration was fatal, so far as any estate purported to pass to the grantee, yet its appearance merely gave the sanction of equity to the deed, and did not alter the nature of the estate taken. In reading "Burton's Conveyancing," however, the following dictum of Lord Bacon (confirmed, so far as applies to the present case, by Mr. Burton, and sanctioned by some cases) struck me as affording the means of testing the accuracy of my opinion. He says (Burton, 44): "That where the party seized to the use and the cestui que trust is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect at the common law." If, then, A. (without consideration) conveys to and to the use of B., B. is in at the common law; and why? Simply because there is no declared seisin of one to the use of another upon which the statute can operate, and the consideration, which alone is capable of raising such a use grounded on the seisin of the grantor, does not make its appearance. But if A., in consideration of £100, conveys to and to the use of B., B. is clearly in under the statute (this being the common mode of limitation at the present day), and this fact has led me to change my mind on the question mooted, as showing that the consideration in a grant is not a mere equitable cheque put upon alienation, but in fact the very soul of the conveyance, raising a use in the grantee founded on the seisin of the grantor, a seisin of one to the use of another, which is all that the statute requires in order to execute the use. I think then that B. clearly takes under the statute, but I should be glad to hear a different view of this point, as the surest way of coming to a right conclusion.

A. L. TROTMAN.

No. 60.—*Underlease by a Lessee for Years—Necessity of Entry by the Underlessee.*

A. (lessee for years) underleases to C. to the use of B. or to and to the use of B. B., in either case, is in at the common law, for there is no declared seisin to a use upon which the statute can operate, and the reservation of the rent (considered as the consideration) cannot raise a use grounded on the seisin of the lessor, for he is only possessed. Entry would seem, therefore, clearly to be incumbent on B., who, until such entry, would have only an *interesse termini*. Will any correspondent inform me whether entry is in such a case usual, and, if not, how it is avoided? A. L. TROTMAN.

No. 61.—*Construction of the Statute of Uses.*

A., for valuable consideration, conveys to B. in trust for C. Will C. take the legal or equitable estate? The mooter thinks he will take the legal, this being a case within the letter as well as the meaning of the statute: within the letter, for the statute provides in terms for the case of one person "seised to the use, trust, or confidence of another person;" and within the meaning: for such a trust would, I apprehend, have been enforced in equity before the statute, and it was for the conversion of such equitable estates into legal estates that the statute was passed. A. L. TROTMAN.

No. 62.—*Divorce à Vinculis Matrimonii—Whether it causes the Revival of a Will made by the Wife before Marriage?*

A. (a feme sole) makes a will, and marries, by which marriage the will is revoked. A divorce à vinculis matrimonii subsequently takes place. Will such a divorce operate as a revival of the will? The mooter thinks it will not, the case being apparently governed by the express words of the 1 Vic. c. 26, s. 22, "That no will or codicil, if revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as the act requires, and showing an intention to revive the same." A. L. TROTMAN.

No. 63.—*Chief-Rent*

In the year 1835, A. B. conveyed to trustees in trust, &c. (*inter alia*), "all that fee-farm or chief-rent arising to him, the said A. B., his heirs and assigns out of or from the constabulary or township of B. as in right of his manor and paid by the constable for the time being of the said township of B. at Michaelmas in every year."

The rent has been paid by the township from the year 1835, down to the last five or six years, and since this time, they have been frequently applied to for the same, but refuse paying on the grounds that the trustees cannot show a good title.

It appears by the 4 Geo. 2, c. 28, s. 5, to be ne-

cessary to prove that payments were made between the year 1711 and 1781 to establish a right to dis-train, which unfortunately, cannot be complied with in consequence of the rent-roll being lost or destroyed for those periods.

Can any of your readers inform me, whether it is possible to establish the right of the party who is desirous of seeking relief without proving the payments as enacted by the above statute; and if any cases on this head have been decided?

J. R. (Leek).

No. 64.—*Limitation upon a failure of issue.*

A. by his will dated in 1826, devised real estate to his son C. and his heirs, and in case his son C. should die without living issue, then over to his testator's eldest son B. his heirs and assigns for ever. Under the above devise, what estate does C. take?

A. SUBSCRIBER.

SOLICITORS AND ARTICLED CLERKS.

1.—*Service with London Agent.*

By the 6 & 7. Vic. c. 73 s. 6, an articulated clerk is entitled to spend one year out of his five with the London Agent.

Can you inform me whether such year must be consecutive, or whether it may be spent at different times during the whole term? M. F. B.

[It is usual for the period above referred to, to be consecutive, but there does not appear to be any necessity for its so being; at the same time it would not suffice to make up the whole year with several short periods, but we should think that six months might be served at one portion of the articles and the other six months at a different time.]—EDS.

2.—*Articled Clerk acting as Agent for Company.*

If an articulated clerk be appointed agent for an assurance company, and acts in that capacity for the transaction of the business of the office in a particular locality, receiving a remuneration for his trouble, by commission, will the appointment and acting be such an employment or business as is prohibited for him to engage in, so as to affect his articles? And must he, if appointed, refrain from acting in such office until admitted, premising that the appointment will then be of use to him in his business.

AN ARTICLED CLERK.

[If the business for the office be transacted after office hours, there can be no objection to the appointment; nor if it be done within office hours, and only occupying a small portion of time, and being transacted with the assent of the solicitor. Otherwise, such an appointment and employment would be objectionable, and endanger the service under the articles, and the clerk would do well to postpone the appointment until after he is admitted.]—EDS.

DEFECTS IN BANKRUPTCY LAW.

WE are threatened with alterations in the bankruptcy laws in consequence of the defects which have been found to exist in the law even under the improved provisions of the Consolidation Act, 1849. Among the most sensible of the observations on these defects are those made by Mr. M. D. Lowndes, of Liverpool, and as much useful information as to the existing law and practice is to be found in those observations, we present some extracts therefrom.

Arrest of debtors.—At present, our law admits only of the seizure of the person after judgment recovered, or under an order in the nature of a judgment, except where the debtor manifests by some overt act, his intention to abscond, and then permits a judge of one of the superior courts, or a judge of the bankruptcy court, or a judge of the county court, on special facts laid before him by affidavit, showing the debt, and the evidence of the debtor's intention to abscond, to make an order for the debtor to be arrested or held to bail. And the same act which abolished arrest on *mesne process*, advanced the creditor's remedy by permitting a judgment creditor to attach valuable interests in joint-stock companies, which could not be seized by the sheriff at common law. And the Common Law Procedure Act of last session permits the attachment of debts owing to the debtor.

No attachment of goods—Bankruptcy.—But if the inquiry be made, whether all has been done for the creditor which in reason and justice ought to be accorded to him, I venture to think not. I have known a person absconding by one vessel, and valuable goods he was removing from the country shipped by a subsequent one; the creditor arriving too late to arrest the debtor, but in sufficient time to identify goods in the course of shipment on the debtor's account, but unable to take any step to detain the goods. It might be supposed that the Court of Bankruptcy would, at all events, be assisting to the creditor to seize the goods in such a case. Under any properly prepared code of bankruptcy no doubt such a remedy would be provided, by making each district court ancillary to the court where the trader debtor resided or carried on business; but the Bankruptcy Act of 1849, whilst it permits, by the 21st section, one court to be auxiliary to another as to proofs or examinations, only permits them on a request in writing from the court to be assisted, and a commissioner has no jurisdiction to declare an absconding debtor a bankrupt, unless he has resided or carried on business within his district; and in the instance I have referred to, the trader had not resided or carried on business at all within the district of the court where the goods might have

been seized. But the creditor ought to have some redress in such a case, as well against a trader as against one not in trade, because an absconding debtor might not be a trader, and might leave goods or property behind him which ought to be available for the payment of his debts.

Service of process abroad.—It may be said that the act for the amendment of the law of 1852 has facilitated the remedy where the debtor goes to reside abroad, by permitting the creditor to issue process, and to serve his creditor abroad. This is, no doubt, the intention of the act, but it is so fenced round with forms (I do not say improper ones), and such is the difficulty of getting a foreign agent to attend to the instructions transmitted to him, in addition to the difficulty of finding out the residence of a debtor who has gone abroad with the intention of avoiding his creditors, that the act I have last referred to can be seldom made practically available.

Attachment of goods.—Besides, a debtor residing abroad may owe money in England, and his creditor might find goods or property in England which ought to be available for the payment of his debts, and yet he might not be able to make him bankrupt, either from want of proof of trading or of an act of bankruptcy, so that, without an alteration of the law, such goods or property must remain unmolested. I would, therefore, suggest that where the goods or property of a debtor, non-resident in England, can be found, some process, analogous to the foreign attachment of the City of London, to the arrestment of Scotland, and to the attachment of the United States, and some modification of which I believe common to most of the states on the continent of Europe, should be issuable at the instance of an English creditor under safeguards to prevent abuse. I have here only advocated the change of the law by permitting goods or property to be seized by initiatory process where the debtor is non-resident in England; I am not yet prepared to argue for its being the common mode of procedure in the first instance. I once inquired of a friend resident in Glasgow, much mixed up with the branch of law on which I am addressing you, whether, if he had the power of legislating for Scotland, he would repeal or continue the law of arrestment; his answer was, "We are now accustomed to arrestment, but if the law of arrestment were not interwoven with our law of procedure in general, and become part of our system, I should pause before I introduced it, because of the great commercial inconvenience occasioned by the arrestment of balances in bankers' and merchants' hands." The making of such a law for England is deserving of great consideration. It would be very useful in certain cases, but it would be by no means an unmixed good. In

addition to which, one of our most learned judges was appointed about three years ago, a commissioner to receive evidence, and report on the practicability and desirableness of assimilating the commercial law of the three kingdoms, and he has been pursuing quietly and unostentatiously, but I believe most praiseworthy, this most comprehensive and useful inquiry, which will necessarily embrace the preference to be given to the Scotch or English systems of procedure. One conclusion seems to be irresistible, whether identity of law can be accomplished for the three kingdoms or not, that in each kingdom, and in every part of each kingdom, the law should be uniform—there should not be one mode of procedure applicable to balances at Childs' in Fleet Street, which may not be put in use as to balances, at Twinings' or Coutts' in the Strand. If it is good, it should apply everywhere; if not beneficial, it should cease altogether. It cannot be right that there should be a different remedy for creditors where the goods of their debtors are found in London, Bristol, or Exeter, than if found in Manchester, Liverpool, Birmingham, Hull, or Newcastle.

Registry of judgments—Difficulties arising out of.—The facilities with which judgments can now be obtained in ordinary cases of debt give no cause for complaint of trouble and expense of intermediate proceedings, but this very facility, as to judgments, leads necessarily to their registration in greater numbers, and as these become encumbrances affecting the title to real property, it is an object worthy of consideration whether, without injury to the judgment creditor, purchasers could not be, by a summary and inexpensive method, relieved from the entanglement of several mortgages and of many judgments. If, on the sale of property greatly encumbered by mortgages and judgments, the purchaser were permitted to take out a summons from the Master of the Rolls, or any of the Vice-Chancellors, against the seller, to show cause why the purchase-money should not be paid into the Bank of England, to the credit of the Accountant-General in Chancery; to the joint credit of the sellers and encumbrancers of such and such a property, or other distinctive title, and if no sufficient cause were shown, if the court were empowered to make the order on such summons, and it were enacted that the Accountant-General's certificate of payment of purchase-money should be a discharge from all encumbrances as to such purchaser, it would afford one of the great facilities rendered by the Encumbered Estates' Act in Ireland, without any additional machinery, as the Court of Chancery could, at a light expense, settle the equities between the seller of the property and the various incum-

brancers, a proper subject of inquiry between them, but with which the purchaser has nothing to do.

Every debtor in insolvent or doubtful circumstances should be encouraged to make an early revelation of his affairs to his creditors, and the creditors should meet their debtor's approaches by sympathy and forbearance, and even assistance, where practicable. But to effect so great a good, a considerable change will be necessary in the law; the debtor must have time to consult with his creditors, without being visited with proceedings ostensibly to make him bankrupt, but often merely to extort from the debtor, or his relations or creditors (for creditors are sometimes needlessly alarmed at the supposed consequences of bankruptcy to their own interests), terms advantageous to themselves, quite regardless of the equitable arrangement which ought to be made when a debtor cannot pay all in full. And I regret to say, that instances are by no means wanting among members of our profession of encouragement of hard-hearted or avaricious creditors, and who, being known to have unlimited influence over clients being creditors, have insisted on large sums being paid to them, nominally as costs which they had incurred, or which they might have derived from the prosecution of a bankruptcy, but really as bribes for prevailing on their clients to come into terms of arrangement. This conduct is disgraceful to a liberal profession, and I trust that it will be denounced by every member of it wherever attempted.

The Bankruptcy Consolidation Act defective and should be revised.—The master grievance of the law of debtor and creditors as a body is, as it seems to me, the Bankrupt Act of 1849. I do not mean to say that many of the changes introduced by it are not very useful; on the contrary, I think the giving of original jurisdiction to each district court a very salutary improvement, but there has been no act of Parliament since I entered the profession, now more than thirty-five years ago, which has occasioned so much doubt and difficulty in its construction, and which, I believe, mainly arises from these circumstances:—In 1848 and 1849 a committee of the great wholesale houses in England, a numerous and wealthy body, and, perhaps, containing the largest number of sellers on credit, sat in London, to obtain from the Government of the day such a bankruptcy code as would remedy the grievances of which they as a body had most to complain. This influential body won over the energy of Lord Brougham, and under his auspices, in the session of 1849, a long bankruptcy bill, broken up into divisions and subdivisions, was presented to the House of Commons. The clauses of the bill were, it is believed, from many hands, some not skilled in

Parliamentary draftsmanship, nor even versed in the language of the acts of Parliament. However this may be, the bill being introduced, and so sanctioned and backed by the influence of the standing committee to which I have referred, the Government of the day felt under an obligation to do something; and when the session was far advanced, a select committee was appointed to receive evidence on the whole subject of the bankrupt law. To them, of course, the bill was referred, the then Attorney-General, now the Lord Chief Justice of the Common Pleas, being appointed chairman. A vast body of evidence was received, occupying till a very late period in that session, which would have required much time to arrange and deal with properly, but the Government being determined that a bankruptcy bill should be passed, having been defeated on a division on the question of its postponement, the ill-digested and incoherent mass forming the Bankruptcy Consolidation Act, 1849, was the result, the difficulties and perplexities of which, instead of being alleviated by time, only become more apparent each succeeding term. I trust a memorial will be presented to the Lord Chancellor, praying his lordship to have the Bankruptcy Act of 1849 submitted to the three gentlemen (whom his lordship has appointed to revise and consolidate the statutes on important branches of the law), as being one requiring revision more urgently than any other, and with instructions to remodel and build anew a statute of bankruptcy, having regard to the evidence taken under the late commission, as well as to that before the committee in 1849, and where the draftsman shall not wilfully change or ignore what was useful and intelligible in the act of 1826, and in which new matters shall be expressed in plain and intelligible, and not in incoherent and contradictory terms, like many portions of the act of 1849, and particularly the clauses as to arrangements by deeds.

Arrangement clauses.—It is on account of the operation of these clauses, the defenceless state in which the arranging debtor and his creditors are left, that important changes are here necessary. Debtors must be induced to make known early their actual position to their creditors, and the debtor and his creditors must have time to meet and concert measures for their mutual benefit, unmolested by the machinations of litigious and sordid persons, due care being taken in the meantime that the property of the debtor is adequately protected, and I venture to think that by a modification of clauses already existing in the Bankrupt Act, this great boon to debtors and creditors might be afforded. The clauses in the act, as to arrangement by deed, originated with eminent solicitors in the city, but these underwent alterations in their progress through the

two Houses, as is shown by Mr. Lavie's letter to the last Commissioners on Bankruptcy, from which arose their ambiguity and obscurity; nor shall we ever be free from difficulties of this nature until Parliamentary draftsmen are employed and paid for by the State, to whom the preparation of all public bills shall be entrusted, and to whom, also, all amendments, whether by substantive clauses, or by omission from or addition to the bill as originally drawn, shall be referred. But, undeniably, under any scheme, the rights of creditors must be duly considered; and it is conceived that under the arrangement clauses under the control of the court, and the clauses as to arrangement by deed, it was by no means considered what a large portion of the debts of commerce are owing on bills of exchange, and which are constantly changing hands before they are at maturity, so that, under both modes of arrangement, impossibilities are required from the arranging debtor. Thus, by the 219th sec. under the arrangement clauses under the control of the court, notice of the private sitting is to be given in writing to every creditor not less than fourteen days before the same is held, such notice to be sent by post addressed to every creditor at his last known place of business or residence. Let any gentleman ask himself how this is to be done as to any merchant in extensive trade, two-thirds of his debts probably being represented by bills of exchange, and the other one-third being due to home and foreign houses; very many of the bill-holders must necessarily be unknown for service, and the foreign creditors could not be served except after a great consumption of time. And where an extensive merchant wishes to obtain relief under the arrangement clauses by deed, he is met by the 235th section, making the arrangement a nullity as to all creditors who have not notice of the arrangement, and exacting from the arranging debtor, in a preliminary proceeding, a minuteness of information which he is not required to furnish under bankruptcy itself.

Usury laws repealed.—Effect of.—The total repeal of the usury laws has just been effected; their re-enactment is, therefore, at present an impossibility, even if it were desirable. It is, therefore, proper to consider the right of the creditor to dictate any rate of interest, however extravagant, as the settled law of the land. But any one who has noticed the proceedings in the Bankruptcy and Insolvent Courts, since the usury laws have been progressively relaxed, must have observed the profligate rates of interest which debtors have engaged to pay, and which, in many cases, they actually paid for loans, some absolutely reserved, in other cases conditionally, in case of default in payment of the principal at the appointed day. Prudent traders

say, that £10 per cent. upon the capital turned over in the course of a year is all that can properly be calculated upon, one year with another, after due allowance for expenses of trade and bad debts. If this be a just calculation, the trader who exceeds that rate of interest commits a positive injustice to those creditors who trust him with goods or money at ordinary rates of interest; and although I do not wish to add to the penal character of the statute of bankruptcy, yet I think that as the lender cannot now be visited for any extortion or oppression in his dealings with a necessitous borrower, the latter should be subject to a deprivation or some suspension of certificate, if he wastes the substance of his creditors in loans, at interest above a fixed rate, at all events so long as losses by gambling or by stock-jobbing are so seriously visited by the Bankrupt Act.

Summoning debtor.—The clauses in the Bankrupt Act, which are found most useful in obtaining payment of debts from reluctant traders, are those relating to bankruptcy notice and summons, that is, section seventy-eight and following clauses. But these sections contain many anomalies, which it is to be hoped will be corrected on any revision of the bankrupt statute. For instance, the place of residence of the trader, not the place of carrying on business, is the criterion as to the jurisdiction of the district court of bankruptcy. The words of the 78th section are, "if the creditor of the trader shall file an affidavit in the court in the district in which such trader shall reside, &c.;" so that if a debtor carry on business in Birmingham, but reside, that is, sleep, according to the construction of residence, in the cases on the poor laws and parliamentary registration, within the jurisdiction of the Bristol court, a creditor must resort to the Bristol court to proceed against him by trader debtor summons. Then suppose a firm of three partners with three houses, one in London, one in Manchester, and one in Liverpool, and a partner resident in each, which of the three courts would have jurisdiction against the other two, for their residence and usual or last known place of abode or business are not within the other's jurisdiction? It may be said, that for the relief of the creditor those clauses should be liberally construed, so as to give any of the three courts jurisdiction. It may be so said; but on the other hand it is usual to consider those parts of the bankrupt statute creating acts of bankruptcy as penal, and, therefore, to be strictly construed. Supposing however, that each court has jurisdiction as to all the partners in the case I have mentioned, what would be the effect as to a partner resident in Scotland? If he were served there, could an English district court

of bankruptcy adjudge him bankrupt? Surely reason and convenience dictate that the district court which contains the place of business of any one of the three houses should have jurisdiction over all the partners of the firm, and that personal service of the summons on any partner within the three kingdoms should be good service. It cannot be wrong to make the place of business of a trader of more importance than his place of dwelling, especially as the very name of "*bankrupt*" is derived from the desertion of the trader's place of business.

THE ACTS OF THE LAST SESSION, &c.

Criminal Justice Act—Bills of Exchange Act—Shortening intervals between assizes—Charitable Trust Act—Religious Worship Act—Defamation Jurisdiction Act—Defects in Law of Evidence—Law of Reconciliation.

It may be useful to the busy practitioner as well as the mere student to have his attention called to some of the measures of the last session, especially as some attempts will be made in the present session to extend or amend some of them, and we avail ourselves for this purpose of some observations contained in a letter from Lord Brougham to Lord Radnor.

Criminal Justice Act [*ante*, p. 123].—The Criminal Justice Act, if it does not remove, goes far to remove, effectually and safely, a very great defect in our procedure. The necessity of committing all persons, charged with the most trifling crimes, to either assizes or sessions, together with the long interval between the holding of these courts everywhere except in the metropolitan counties, produced the greatest hardship to prisoners and serious inconvenience to the country. Many persons were thus kept in gaol, and exposed to all its contamination, who, upon trial, were acquitted. Many were brought to the assizes or sessions, who pleaded guilty upon their arraignment; yet the expense of the prosecution had been in part undergone, and jurors and witnesses summoned, and what is a far greater evil, the previous imprisonment of those convicted was either overlooked, and their punishment was thus unduly increased, or it was taken into the account on considering of the sentence, and their punishment lost part of its effect, because it appeared less than it really was. Nothing, therefore, could be more fit than giving the magistrates at petty sessions authority, in such cases, to take pleas of guilty, and to convict summarily where the accused preferred being tried at once, the entire option being in every instance left to the prisoner, of being tried in the ordinary way at

sessions or assizes. The benefits to be fairly expected from this act may be estimated by a return moved for while it was in progress. It appeared that of the eighty-two prisoners tried at three quarter sessions, fifty-two either pleaded guilty or were tried for offences which would have been dealt with at petty sessions had the act then been in operation.

Bills of Exchange Act [*ante*, pp. 63—65, 197—199, 222—223].—The next measure which may be mentioned to rebut the assertion that nothing was done last session to amend the law, is the Bills of Exchange Act. England alone of all other commercial countries suffered the debtors on bills and notes to evade the payment which under their hands they had promised on a day certain, and to give their creditors, whose money they admitted having received, a lawsuit instead of payment. At the earnest desire of the mercantile bodies all over the country, represented by their delegates in the great conference held November, 1852, a bill was brought in to assimilate the Scotch and English law in this respect, the Scotch being that of all foreign countries; and it passed through the Lords with the cordial support of the Chancellor and Chief Justice, both in 1854 and in last session, the Chief Justice giving as an illustration of its necessity, that he had on the morning of the same day tried at Guildhall fifteen cases on bills and notes, in every one of which there was either a sham defence or no defence at all, so that all originated in the design of merely delaying the performance of the party's written engagement. In the Commons, where this bill was now sent for the second time, another was presented by Mr. Keating; it was much less effectual no doubt but still a great improvement of the law. A select committee further amended it by adopting the most essential provision of the Lords' bill; and it happily passed both Houses and received the Royal Assent; to the great discomfiture of two classes, those who are averse to paying their just debts, and those who view with an evil eye all restraints upon an unlimited issue of paper, including of course accommodation bills.

Shortening intervals between assizes and sessions.—It is to be hoped that a more effectual measure will be carried next session, when it may also be expected, but with still greater confidence, that the chief defect in the Criminal Justice Act, will be supplied by passing the bill which the Chancellor brought in, and which was universally approved by the lords, for shortening the intervals between assize and assize, session and session. Of the various imperfections in our criminal procedure stated in the resolutions of March, there was none which more urgently required to be met by legislative remedy than this. It appeared from the returns

that hundreds of persons (not committed in the metropolitan counties) tried at the assizes and acquitted, were imprisoned on an average sixty days, at sessions thirty, while many who were convicted were sentenced to less than these periods of imprisonment. The summary jurisdiction given to petty sessions may in a great degree remedy the latter part of the evil, but it can have little effect upon the former. The Chancellor, in redemption of his pledge to proceed upon this as well as one or two of the other resolutions, the notice given of having them discussed being withdrawn, brought in the bill enabling three criminal circuits to be holden yearly, and requiring eight general sessions in each county. It contained other important provisions; but it was stopped in the Commons, and the chief obstacle to its passing was the difficulty of dealing with recorders of burghs. If this cannot be got over,—and no doubt it is of importance,—the county court judges in certain burghs may easily be empowered to act at sessions as the recorders in these burghs now do. That the measure is indispensably necessary, no one can doubt who is not prepared to hold the imprisonment of persons proved upon trial to be not guilty, a matter of no moment. If, as is but too probable, the optional clause to the Criminal Justice Act still sends many petty offences to assizes and sessions, the necessity of holding them more frequently will become the more urgent. It may be added that more frequent civil assizes, as well as criminal ought unquestionably to be holden, unless we are prepared very greatly to extend the jurisdiction of the county courts.

Charitable Trusts Act [*ante*, p. 120].—Considerable improvement was made in the Act of 1853, by removing several of its defects and somewhat extending the jurisdiction of the commissioners. But the House of Commons thought fit to narrow that beneficial alteration when the bill went down from the Lords, where it had been most carefully considered in a select committee. Indeed, it is impossible to deny that in all measures for the amendment of the law, the Lords are greatly in advance of the Commons. It is said that in the present *parliamentum supra-doctum*, there are more professional men than were ever before congregated among the representatives of the people. How far this tends to lengthen the sittings and prevent the legislation of the session from bearing its due proportion to the debating, we may not be able accurately to determine; that it has a very direct tendency to defeat measures of legal improvement, no one can doubt.

Religious Worship Act [*ante*, p. 148].—It is, however, satisfactory to reflect that no efforts made in the quarter now referred to were able to prevent Lord Shaftesbury's valuable bill from passing; and

now we happily have the disability removed from churchmen, which had long since ceased to fetter or harass dissenters; so that any congregation for religious worship according to the doctrines and discipline of the Church, may be assembled without episcopal or other license. An extraordinary construction put by the Ecclesiastical Court upon the act of 1812, as if the exemption from the penalties of the intolerant statutes made before the revolution, only applied to dissenting congregations, although the term Protestant alone was employed, rendered this act introduced by Lord Shaftesbury, if not absolutely necessary, yet highly expedient.

Defamation Jurisdiction Act [ante. p. 61].—There were other acts passed during the session, of no inconsiderable value; as Dr. Phillimore's for abolishing the jurisdiction of the Ecclesiastical Courts in cases such as defamation, which properly belong to the temporal courts, and for giving powers to release from prison parties who have been unjustly detained under colour of such proceedings.

Defects in law of evidence.—Lord Brougham ventures to predict that some of the very few but very great defects still remaining in the law of evidence, will also be removed, and this seems hardly doubtful, after the great success which has attended the act of 1851, by the concurring testimony of all lawyers, as well on the bench as at the bar. At the head of these defects, he continues to think, is that rule which protects a witness from answering any question which he conceives may tend to his criminality, grounded upon the same fear of arriving at the truth which makes so many persons exercising judicial and quasi-judicial duties, do their endeavour to prevent those from confessing who are brought before them. That this rule may be relaxed with the greatest benefit to the administration of justice, and without the least unfair pressure upon individuals, seems abundantly clear; and Mr. Pitt Taylor, to whose admirable work on the law of evidence the profession is so greatly indebted, has suggested the course which it appears most expedient to pursue, namely, to restrict the rule (in the first instance at least) to felony, and on all questions to give the court before whom the witness is examined, the discretion of determining whether or not he shall be protected from answering. There are other amendments of the law of evidence suggested by the same work.

Law of Reconciliation.—His lordship concludes his letter by observing that after all our efforts to improve that most important branch of our jurisprudence shall have been made, and shall have succeeded beyond our most sanguine expectations, there will remain the greatest of all the defects in our judicial system, the want of proceeding for reconciliation.

The community, but more especially the poorer classes, will continue to be ground between the upper and nether millstone, and be sacrificed to the profits of, not the respectable branches, but the worst of the legal profession, the harpies who deform and defile it. How long must we ask whether there can be any proposition of fact more absolutely true than this, that if both parties in each dispute went before a respectable and experienced person a judge, and heard his advice upon their cases, in the absence of all professional men, the great majority of hopeless suits and desperate defences would never be known in any court, and more than half the whole number of causes which now are tried would be either abandoned or settled? The experience of Denmark and other countries needs not be cited, powerfully though it confirms this statement, because no man can have a doubt upon the matter antecedent to and independent of all experience.

LAW OF PARTNERSHIP AMENDMENT ACT.

Besides the Limited Liability Act, the government has brought in a bill to amend the law of ordinary partnerships, by providing that the advance of capital to be used in any trade or undertaking not being the trade of a banker upon a contract that the lender shall receive a share of the profits, shall not of itself render the person making the advance liable to third persons as a partner. And so of a contract with an agent or servant for remuneration by a share of profits. The whole bill is so short that we here give its provisions:—

1. The advance of capital or money to be used in any trade or undertaking not being the trade of a banker, upon a contract with the person carrying on such trade or undertaking that the person making such advance shall receive a share of the profits or shall bear a share of the loss of the trade or undertaking, shall not, of itself, render the person making such advance liable to third parties as a partner in such trade or undertaking.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein.

3. In the construction of this act the word "person" shall include a partnership firm, a joint-stock company, and a corporation.

On introducing this bill Mr. Lowe observed that private partnerships were very little interfered with by the law of England, and they were left very much as they stood at common law. The great grievance complained of was not the want of limited liability,

strictly so called—that was to say, the want of a power in a partner, known to a creditor, to contract with that creditor that he should not be liable beyond a certain amount. It was rather the converse of that case which was the subject of complaint—namely, that the dormant partner in a concern should be made liable, not merely for the capital he embarked in it, but to the extent of his entire property upon which the creditor had never given any credit at all. That was the nature of the particular grievance, and the question was how they should deal with it.

Effect of the repeal of the Usury Laws.—Mr. Lowe then referred to the effect of the repeal of the usury laws, which we may mention has been felt in very many ways, and of which just complaint has been made both in bankruptcy and insolvency cases. However, free trade in money is the order of the day, so therefore said Mr. Lowe, “But there was another question arising out of the present state of the law as affecting private partnership which had also to be considered. The House was aware that by an act recently passed the usury laws were repealed, but when that act passed there was probably not a single person who thought of its effect on private partnerships. The repeal of the usury laws, however, completely altered the position of persons lending money to partnerships. It was the opinion of Baron Bramwell, who was well acquainted with the principles of political economy, and still better, he would take leave to say, with the law of the land, as appeared from his evidence before the Mercantile Law Committee, that it was perfectly competent for a person to lend money to a partnership, reserving as much as 50 per cent. by way of penalty, with an agreement that it was not to be enforced if he was paid a rateable share of profits of the concern for the loan. That view was also taken by Lord Eldon in *ex parte Hamper*, 17 Ves. 404. It followed from that it was at the present time possible to lend money to a private partnership, and to receive part of the profits by way of interest on the loan. It was not the intention of her Majesty's Government to narrow or to limit the power which persons now possessed to enter into these contracts.”

Having stated that government had determined not to facilitate the making of loans to partnerships, or to save men from the effects of their own imprudence, Mr. Lowe observed that “the whole evil complained of was this; that partners were liable to their last shilling or last acre for debts to which they were not known at the time to be parties, and that the creditor could come upon property on the security of which he never lent his money. That was the principle laid down in the case of *Waugh and Carter* (H. Bl. 235), and it was the opinion of

some of the highest jurists, and amongst them Judge Story, that it would have been better if the case was decided the other way. What he proposed to do, therefore, was to introduce a measure which would have the effect of reversing the decision in the case of *Waugh and Carter*. The law would then stand thus, that a man might become a dormant partner in a concern, and put a certain sum of money into it, without the risk of losing any money beyond the sum put in. The result would be that you would have in effect the system of *commandite*, without making any great innovation in your old law, and the system of loans, not carried on in the circuitous manner which he had described, but directly. Bankers were left out not because he saw any good reason for doing so, but from respect to the former course of legislation in that House, which had been to leave out bankers, and because he was unwilling to complicate the present subject with any questions relating to banking and currency. But for his own part he saw no reason why bankers should be excluded.

NOTICES OF NEW BOOKS.

ROUSE'S CONVEYANCER.

The Practical Conveyancer a Companion to Rouse's Practical Man, giving, in a mode combining Facility of Reference with General Utility, 365 Precedents of Conveyances, Mortgages and Leases, and a Collection of Miscellaneous Forms. By ROLLA ROUSE, Esq., of the Middle Temple, Barrister-at-Law, Author of “*The Practical Man*,” “*The Copyhold Enfranchisement Manual*,” &c. &c. London: BUTTERWORTHS, 7, Fleet Street.

THE profession will soon have no need to complain of the want of works containing Forms of Conveyances; we have but recently noticed three different works, viz., Mr. Crabbs Precedents; Mr. Horsey's Cornish's Forms; and Mr. Prideaux's Precedents, besides which there are, we believe, other works, to say nothing of the new edition of Davidson's Precedents. Mr. Rouse is the author of many works, so that his name is already familiar to the legal public, and which may be considered as some guarantee for his competency to produce a work of some utility, for it is undoubtedly true that there is an art or craft in authorship which though it cannot altogether supersede the necessity for learning, may yet greatly assist the learned writer in making the most of his materials.

It is impossible for us to do justice to the labours of Mr. Rouse in the volume now before us, arising from the abundance of matter which he has in a comparatively small volume, furnished. We must,

therefore, have recourse to Mr. Rouse's preface from which we shall be able not only to give our readers an idea of the deficiencies of other works containing forms, but also to point out what are the improvements to which Mr. Rouse lays claim as distinguishing his work from others which have before appeared. We are informed that "the objection stated so long ago, as in the preface to the first edition of 'Barton's Precedents,' appeared to me to still exist. I mean, that the precedents usually given, are those from drafts submitted to counsel, either on account of some special circumstances attending the title, or for the purpose of securing the distinct interest of some particular parties, and are therefore found not only defective as a body of precedents, but also to be frequently either of too *special* a kind to be of use in the ordinary course of business, or too *partially* drawn to be relied upon in *general* cases." As we have before stated, the arrangement of "Barton's Precedents" was, to a certain extent, not badly suited for reference; but, says Mr. Rouse, "the alterations in the law have rendered that work obsolete: and even as respects arrangement, I think it was rendered somewhat inconvenient, from the number of references and riders; which, to a young practitioner especially, or to a solicitor in giving instructions to a clerk to prepare a draft, would lead to extra trouble, and require much more care, than if each draft should be given complete in itself. On the other hand, by giving each draft complete in the ordinary way, a work, containing many precedents, would be very bulky, and necessarily expensive."

We then have Mr. Rouse's plan, on which he says "It appeared to me that, by adopting the course usual with conveyancers in preparing a draft, all the advantage of having the drafts complete might be obtained, and yet the forms given within a small space. That course is, to first prepare an outline of the draft, and then fill up the clauses. Not only will the experienced practitioner find this the readiest mode of preparing a draft himself, but the means of enabling him to detect, at a glance, any unsuitableness in the form; and, if possessed of numbered clauses, he will also be able, in a few words and figures, to give instructions to a clerk to prepare even a lengthy draft. To a young practitioner, also, the having before him a sort of bird's-eye view of the draft, would free him from being confused by its length and complexity, and he would not, in filling up each clause, have his attention distracted by considering the effect of the draft generally. Again it appeared to me, that the arrangement of forms might be improved, by giving the variations according to the order of the different parts in a conveyance. Thus, to commence with variations in the parties conveying; then take those in the parties to whom

the conveyance is made; next, in the consideration; then in the grant, and afterwards in the parcels and estate conveyed. Adopting such an arrangement,—however numerous might be the collection of forms,—the part of the table of contents to which reference should be made would be known at once, and much time saved in looking for the form required. In accordance with these views, I prepared the forms, giving in each case a complete outline of the draft, with the letters and numbers of the clauses in full, required to complete its respective parts."

With respect to the subject of references from one set of precedents or even volume of precedents, with the annoyance of which the practitioner is well acquainted. Mr. Rouse says: "I am aware that, by some professional men, an objection is entertained to references in precedents; and I agree, that when the references are to other precedents, the objection is well founded, especially where, as in some large works on conveyancing references are made not only to other precedents, but, in many instances, to two or three, in as many different volumes. If, however, no references are made to other *precedents*, but merely to *numbered clauses*, all given separately, and in a way to be readily found, I think the objection will not apply."

Mr. Rouse in order to show the advantage derivable from preparing forms in the mode adopted in his work, informs us that whilst "Bythewood's Conveyancing" has but 60 precedents of purchase deeds, 81 of mortgages, and 31 of leases, the above work of Mr. Rouse, though complete in one volume contains 212 precedents of purchase-deeds, 118 of mortgages, and 35 of leases, making a total of 365 against Bythewood's 172. This is certainly a great advantage and the reader will be curious to know how such can be the case, seeing that Mr. Bythewood's Work is much larger, and devotes a volume to each of those subjects. Indeed (we are speaking of Mr. Sweet's edition), as to mortgages, there are two volumes, though as a deduction from this calculation, it must be remembered, that Bythewood's work contains a large mass of text matter. Mr. Rouse has been enabled to give so many precedents by the adoption of an admirable system of arrangement, and the adoption of outlines of precedents with references to the usual clauses, and yet all done in so simple a manner that the merest clerk might sketch out a draft ready for the master's supervision and settlement.

Let us hear what Mr. Rouse himself says as to some of the advantages attending his plan, as respects the practitioner, the clerk, and the student.

"To the Practitioner.—*Firstly*. A saving of, at least, three fourths in expense; as no work, giving the forms in the ordinary way, could be published at

less than, if so little as, four times the expense of this work, if containing the same number of forms.

Secondly. If themselves preparing drafts,—instead of having to refer to several precedents, and select the parts of different deeds which may be applicable, the arrangement of the table of contents in this work, will enable him to know at once into what part of it to look in order to find any draft he may require.

Thirdly. In directing a clerk to prepare a draft, even of a special deed, he need only note down the number of the form to be taken, give names of parties and consideration money, and sheets in the abstracts when deeds recited, and the parcels will be found, in order to have the draft prepared with but little fear of mistakes.

Fourthly. In the instruction of articulated clerks, by being able to point out to them in a simple manner the variations between the different deeds.

To the *Clerk*, by the readiness with which he will find the required form, instead of having to go through and select from numerous drafts.

To the *Student*, by enabling him to better understand a deed, the different parts of which appear plainly in outline before him, than by having to wade through long and heavy clauses; whilst he can, also, by carefully rending over those clauses separately, make himself fully acquainted with the details of the deed.

He will also derive advantage from the ready means afforded him of comparing different and yet somewhat similar drafts, and noticing in what they differ. To do this, he might copy the outline forms, strike out the clauses which agree, and then compare those which differ; or he might compare them in the book without copying, and refer merely to the clauses, the outlines of which differ; the former would however be, I think, the better course.

The outline and full table of contents will, I trust, be found to render needless any further remarks by me explanatory of the work.

There is, however, one remark I would make, not by way of explanation, but of suggestion; and that is, by drawing attention to the great advantage which would arise from the general adoption of the power of attorney to surrender, in a mortgage of copyholds with power of sale.

Such power is introduced in the forms here given; it may in many cases be the means of avoiding much expense and difficulty, and it is not liable to the objection to which a surrender to uses was held liable in the case of *The Queen v. Downing College*.

I have endeavoured to make the present work really practical and useful, and sincerely hope it may be so found by the profession."

From an examination of the work we can say, so far as the plan of it is concerned, that Mr. Rouse

has fully succeeded in his endeavours to make his work *really practical and useful*, and we say that every solicitor will do well, whether he have other works or not; to purchase Mr. Rouse's volume, and we assure our readers that they will never grudge the money it costs (and that fortunately is not much), for in a very short time it will be found to be invaluable even to the most experienced conveyancer. We doubt not that the work will become a standard one, should its forms be found in practice to be trustworthy, which we see no reason to doubt, and our only regret is that Mr. Rouse has not extended his labours to settlements and wills, instead of having confined them to purchase-deeds, mortgages and leases.

TUDOR'S LEADING CASES IN CONVEYANCING.

A Selection of Leading Cases on Real Property, Conveyancing and the Construction of Wills and Deeds: with notes. By OWEN DAVIES TUDOR, of the Middle Temple, Barrister-at-Law, Author of a Selection of Leading Cases in Equity. London: Butterworths.

SINCE the late Mr. Smith set the fashion, "Leading Cases" have been favourites with the profession, and Mr. Tudor himself has assisted in the production of one work relating to equity of no little utility, and he now offers to the profession another work on the same plan, but embracing a different division of the law. There can be no doubt that works of this kind are of utility, and there is not less doubt that they are generally acceptable, the fact being that they are more varied in their contents than works professedly treating of one and frequently a very limited subject. In addition many persons feel great repugnance to the perusal of a volume purporting to treat of a branch of the law in a methodical and continuous connexion, it being often found that such works require too much attention from the reader and will not admit of an occasional or cursory perusal; to such persons, works like the present offer a great inducement, as within a moderate compass a variety of subjects can be considered and if not exhausted, yet affording a good opportunity for furnishing useful and instructive remarks.

Mr. Tudor's present volume (which by the way we may mention is one of considerable size) embraces about thirty-five leading cases on some of the most important subjects in real property and conveyancing law, including the construction of wills and deeds. The principal of the cases thus selected for illustration, are from "Lord Coke's Reports," than which no better or sounder source could have been had recourse to. Among the subjects treated of by Mr. Tudor, we may mention those of the Accumulation

of Income, Advowsons, Charities, Gifts and bequests in Will, Commons, Conditions, Curtesy, Descent, Dower, Easements, Escheats, Evidence in construction of Wills, Forfeiture, Gifts by Implication, Joint Tenants, Tenants in Common, and other interests or estates in land whether created by deed or will, Legal estate in Trustees, Merger, Perpetuities, Powers, Rent, Rule in Shelley's Case, Trusts and Uses, Vesting of Legacies, Waste, and the other usual heads of Real Property Law.

The following extracts from different portions of the volume will show how Mr. Tudor has performed his task. Our first extracts shall be from the notes to Tyrringham's case (7 Coke's Rep. 5 a), which is a leading case as to commons and rights of commons, upon which Mr. Tudor has expatiated at some length, showing the different kinds of commons and how acquired and lost.

"*The Incidents to Rights of Common, and herein of the respective Rights of the Lord and Commoners.*—As the lord is the owner of the soil of the common, subject to the rights of the commoners, he may, as a general rule, exercise all acts of ownership over the soil which do not injure their rights, such as planting trees or making fishponds, breeding game, digging clay for bricks, getting coal or other minerals, provided he does as little damage as possible. Kirby v. Sadgrove, 1 Bos. and Pul. 13; Hassard v. Cantrell, 1 Lutw. 107; Coe v. Canthorn, 1 Keb. 390; 5 Vin. Abr. 7, 39, per Windham, J., in notis.

"The lord has likewise a right of common upon his own land; for, as observes Lord Coke, 'if a man claim by prescription any manner of common in another's land, and that the owner of the land shall be excluded to have pasture, estovers or the like, this is a prescription or custom against the law, to exclude the owner of the soil, for it is against the nature of this word *common*, and it was implied in the first grant, that the owner of the soil should take his reasonable profit there, as it hath been adjudged' (Co. Litt. 122 a). But 'a man may prescribe or allege a custom to have and enjoy, *solum vesturam terræ*, from such a day till such a day, and thereby the owner of the soil will be excluded from pasturing or feeding there; and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soil from feeding there'" (Co. Litt. 122 a).

"It was indeed doubted in North v. Cox, 1 Lev. 253, whether a party could prescribe to take the sole and several herbage, but it was afterwards established as law by the cases of Hoskins v. Robbins, Pollexf. 13; Potter v. North, 1 Vent. 385; 1 Saund. 350; see also Welcome v. Upton, 6 Mees. and W. 536. However, a separate right of feeding and folding, claimed on account of a manor farm, is not a claim of common, properly so called, but something re-

served out of the original grant. 4 Scott, N. R. 356, per Tindal, C. J.

"By the Statute of Merton (20 Hen. 3, c. 4, extended by 2nd Westminster, 13 Ed. 1. st. 1, c. 46, and 3 & 4 Ed. 6, c. 3), which seems to have confirmed the common law (2 Inst. 85; 3 T. R. 447), the lord of the manor, and it seems any owner of the soil, although not properly speaking the lord of the manor (Glover v. Lane, 3 T. R. 445; Patrick v. Stubbs, 9 Mees. and W. 830), may approve or inclose part of the common as against the commoners, provided that he leave sufficient pasture for them, with free egress and regress from their tenements into the pasture (20 Hen. 3. c. 4), even if afterwards it becomes insufficient (2 Inst. 87); but the onus of proving that a sufficiency was left lies with the lord. Arlett v. Ellis, 7 B. and C. 463; Lake v. Plaxton, 10 Exch. 196.

"A custom for the lord to inclose (Arlett v. Ellis, 7 B. and C. 346), or to grant leases of the waste (Badger v. Ford, 3 B. and Ald. 153), without limit or restriction, is bad.

"The Statute of Merton does not give the lord power to approve any kind of common, except common of pasture; it seems, therefore, that in the absence of a custom which would be valid (Arlett v. Ellis, 7 B. and C. 346, 370, 371), the lord cannot against common of turbary, because it has been said that common of turbary being necessarily by grant, the lord can do nothing in derogation thereof. Grant v. Gunner, 1 Taunt 435; and see Duberley v. Page, 2 T. R. 391, where the tenants had a right to dig gravel.

"The lord of the manor or his grantee may inclose or approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as common of turbary, common of estovers, common of piscary, or a right to dig sand, provided he leaves sufficient common of pasture (Fawcett v. Strickland, Willes, 57; Com. Rep. 578; Shakespear v. Peppin, 6 T. R. 741); but if the improvement interfere with those other rights, the commoners may bring their action against the lord (6 T. R. 748).

"Where the lord of the manor makes a hedge round the common, or does any act, that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common (per Lord Kenyon, C. J., in Sadgrove v. Kirby, 6 T. R. 485). Hence it has been held, that under such circumstances the commoner may break down the whole of a fence put up by the lord (Arlett v. Ellis, 7 B. and C. 346); but if the commoner can get at the common and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that case his

remedy is by action against the lord, and he cannot assert his right by an act of his own (per Lord Kenyon, C. J., 6 T. R. 486). Thus it has been held, where a lord had planted trees and turned out rabbits on the waste,—legal rights which as owner of the soil he might clearly exercise, provided he left a sufficiency of common for the commoners,—the commoner in such case cannot take upon himself to decide that the trees or rabbits on the common are a nuisance, and to cut down the trees or destroy the rabbits; but he is bound in the first instance to bring his action, and to establish to the satisfaction of a jury that they are a nuisance (per Bayley, J., 7 B. and C. 363; and see *Sadgrove v. Kirby*, 6 T. R. 483; *Cooper v. Marshall*, 1 Burr. 259). The Court of Chancery will assist and protect the lord in making an approvement under the Statute of Merton (*Weeks v. Staker*, 2 Vern. 301; *Arthington v. Fawkes*, *Id.* 356; — *v. Palmer*, 5 Vin. Abr. 7).

"As to what buildings the lord may erect on the waste by the Statute of Westminster, 2, see *Nevill v. Hamerton*, 1 Sid. 79; 1 Lev. 62; 1 Keb. 283, 314; *Patrick v. Stubbs*, 9 M. and W. 830; but as that statute only applies to common of pasture, common of turbary or estovers must not be thereby injured (*Duberley v. Page*, 2 T. R. 391; *Shakespeare v. Peppin*, 6 T. R. 747).

"We have already sufficiently examined the rights of the commoners with respect to common of piscary, estovers and turbary.

"With regard to their rights in the case of common of pasture, it must always be remembered that they have no interest in, and cannot meddle with the soil, but have only a right to take the grass itself by the mouths of their cattle. Thus it has been held, that a commoner cannot make a trench or ditch on a common to let off the water unless authorised by custom (1 Roll. Abr. 406; 3 Cruise Dig. 75). So likewise he cannot destroy or drive off the conies, or fill up their burrows (*Sir Jerome Horsey v. Hagberton*, Cro. Jac. 229; *Cooper v. Marshall*, 1 Burr. 259).

"The lord, however, by his grant of the common gives everything incident to the enjoyment of it, as ingress and egress; and thereby authorises the commoner to remove every obstruction to his cattle's grazing the grass which grows upon such a spot of ground, because every such obstruction is directly contrary to the terms of the grant. A hedge, a gate or a wall, to keep the commoner's cattle out, is inconsistent with a grant which gives them a right to come in (per Lord Mansfield, C. J., 1 Burr. 265).

"Where the lord of a manor conveys away part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of

common still subsists in the commoners, as well over that part of the wastes which the lord has conveyed away as over that part which he retains in his own hands per Lord Kenyon, C. J., 8 T. R. 401."

In another part of the work, the case of *Corleyn v. French* (4 Ves 418), is stated, which gives Mr. Tudor the opportunity of stating the law as to gifts in, what is termed, mortmain; and from one of the sections of Mr. Tudor's Notes, we take the following:—

"*What Gifts to Charities by Deed are valid as complying with the Requisitions of the Statute.*—With regard to a conveyance made as required by the act, it will be observed, in the first place, that they must be executed *twelve* calendar months before the death of the grantor, and must be enrolled within six calendar months after execution. It will be sufficient if the grantor has executed it, although the grantees may not have done so before enrolment (*Grieves v. Case*, 2 Cox. 301), and although the grantor retain possession of the deed afterwards (*Attorney-General v. Munby*, 1 Mer. 327.)

"If the deed be not duly enrolled, the grantor may himself take advantage of the want of compliance with the requisitions of the act and recover the property (*Doe d. Wellard v. Hawthorn*, 2 B. and Ald. 96; *Doe d. Preece v. Howells*, 2 B. and Ald. 744; *Attorney-General v. Mundy*, 1 Mer. 327; see also *Doe v. Wright*, 2 B. and Ald. 710).

"The courts will not presume the enrolment of a deed even after a considerable period has elapsed since its execution (*Doe d. Howson v. Waterton*, 3 B. and Ald. 149; *Wright v. Smithies*, 10 East, 409).

"But it seems that they are not bound upon public policy to take the objection of the absence of enrolment, which the party legally entitled to the property does not insist upon. Hence where trustees for a Dissenters' meetinghouse, in whom the legal estate was vested, admitted the trust, and did not raise the objection that the deed was void as not being enrolled under the statute, but submitted to act as the court should direct, it was held by Sir James Wigram, V. C., that it was not competent to persons who had seceded from the society to raise the objection and that the court might appoint new trustees of the land (*Attorney-General v. Ward*, 6 Hare, 477).

"A conveyance of land to trustees for charitable purposes duly enrolled will be valid, although it be made in pursuance of deeds relating to the same land, and preliminary to those purposes, which have not been enrolled (*Attorney-General v. Munro*, 9 Jur. 461; 1 Holt's Eq. Rep. 99).

"A mortgage to trustees of a charity does not, it seems, require enrolment (*Doe d. Graham v. Hawkins*, 6 Jur. 215).

"Although a deed be properly enrolled, yet if the grantor die within twelve calendar months from its execution it will be void (*Price v. Hathaway*, 6 Madd. 304).

"As to whether a conveyance, void from the want of enrolment, will revoke a prior will, see *Matthews v. Venables*, 2 Bing, 136; *S. C.* 9 Moore, 286.

"Conveyances for valuable consideration upon trusts for the education of the poor, and not enrolled, are rendered valid, if enrolled within twelve calendar months from the passing of 4 & 5 Vic. c. 38, s. 16 (21 June, 1841). And deeds for the purposes of the last-mentioned act are to be valid, although the donor die within twelve calendar months (7 & 8 Vic. c. 37, s. 8).

"Grants also of land by absolute owners or tenants in tail, for sites of schools for instruction of masters and mistresses of elementary schools for poor persons, are also to be valid, although the grantor die within twelve calendar months (12 & 13 Vict. c. 49, s. 4); and see 15 & 16 Vic. c. 49, as to schools or colleges for the sons of yeomen, tradesmen and others, or for the theological training of candidates for holy orders.

"The donor may, it seems, without rendering his gift invalid, reserve to himself the power of regulating the charity (*Grieves v. Case*, 2 Cox. 301); and a condition by which a vault and tomb is to be repaired and to be used for the grantor and his family, is not a reservation rendering a conveyance invalid within the meaning of the act, 'the object of the act only being to prevent a reservation, under colour of charitable use, of some substantial benefit to the donor himself,' *Doe d. Thompson v. Pitcher*, 3 Mau. and Sel. 407, 410; 2 Marsh. 61; 6 Taunt. 359.

"A grant by indenture executed more than twelve months before the grantor's death, and duly enrolled, of a house and premises held under a church lease to Trinity College, Cambridge, in trust for the rector of a parish, was held by Sir William Grant, M. R., to be valid under the statute, and not to be affected by the circumstance of the grantor being himself at the time of the grant, rector of the parish, and retaining the deed in his own possession. 'The grant,' said his Honour, 'does not contain any reservation, the gift does take effect immediately in possession; there is no power of revocation, no trust, express or implied, from which the grantor, in his individual capacity, can derive any benefit; and although it is said that, on the face of the deed, the grantor is rector, and his gift is a gift for the benefit of the rector, yet it must, on the other hand, be acknowledged that this is a case for which the statute makes no provision, which is entirely out of its contemplation; that the gift itself is absolute and irrevocable; the benefit which the grantor enjoys under it only accidental; his enjoyment of the pro-

perty no longer an enjoyment as owner, but as attached to the situation in which he happens to be placed. The moment he quits that situation, he loses all enjoyment of the property, and that may be by circumstances over which he has no manner of control, by deprivation, or appointment to a higher benefice, perhaps at the very time when he is executing the instrument. The legislature had no intention or thought of precluding this sort of incidental advantage; and to construe the statute otherwise would be to prohibit a rector from bestowing any endowment on his own living,' *Attorney-General v. Munby*, 1 Mer. 827.

"Where there is a resulting trust to the grantor during his life, in consequence of no trust being declared for the charity during that period, the grant will be void under the statute as not being 'to take effect in possession for the charitable use immediately from the making thereof,' *Limbrey v. Gurr*, 6 Madd. 151.

"Although all the requisitions of the statute are apparently complied with by the grantor, nevertheless if there be an agreement or understanding or design among the parties to the deed, that the payment of the income is not to be enforced during the life of the grantor, the deed will be void, as the whole transaction will be considered as a fraud upon the statute. The onus, however, of proving such an agreement or undertaking or design rests on those who allege it as plaintiffs (*Way v. East*, 2 Drew, 44).

"The second sec. of the Mortmain Act (in which the formalities required by the first are, it has been said, not required) was, it seems, suggested by the case of Queen Anne's Bounty, and other existing charities, where money was from time to time to be laid out in purchasing lands (*Attorney-General v. Day*, 1 Ves. 222; *Vaughan v. Farrer*, 2 Ves. 188; *Price v. Hathaway*, 6 Madd. 313); it was not intended to leave every person at liberty within twelve months before his death to give to charitable uses any land which within twelve months he had purchased for full and valuable consideration, see *Price v. Hathaway*, 6 Madd. 304.

"In order to bring the case within the second sec. the consideration must be paid by the person for whose benefit the conveyance is made (*Doe d. Preece v. Howells*, 2 B. and Ad. 744). And the purchase must be *bonâ fide* and for full and valuable consideration, otherwise it will be void (*Doe d. Wellard v. Hawthorn*, 2 B. and Ald. 96; *Attorney-General v. Ward*, 6 Hare, 477).

"However, by the 9 Geo. 4, c. 85, after reciting that it was only intended to prevent such purchases from being avoided by reason of the death of the grantor within twelve calendar months after the sealing and delivery of the deed or deeds relating

thereto, it is enacted, that where lands have been purchased for full and valuable consideration for charitable uses, deeds of conveyance executed before the 25th July, 1828, are to be valid, although the formalities prescribed by 9 Geo. 2, c. 36, have not been observed."

Having thus finished (at a greater length than usual), our extracts from Mr. Tudor's volume, our readers will in some degree be prepared to form a judgment of it, but we must in justice add that it would be wrong to do so entirely from our specimens and that it is a work to which we cannot hope to do justice, both from its size and the number of subjects treated of—it must be read to be duly appreciated. This, however, we can say, that it is a work which will well repay perusal, and we would recommend those of our readers who are anxious for instruction on some of the most abstruse points of the law of real property, to purchase and carefully read the volume of Mr. Tudor, and then we are satisfied that they will recognise the utility of the labours of the annotator and find themselves much improved thereby. As we have before said the volume is a large one, but to this the purchaser will hardly object, as he will find he has obtained quality as well as quantity.

GREENWOOD'S MANUAL OF CONVEYANCING.

This work arrived too late for notice in this number; in our next we shall notice it, especially as it aims to present practical directions in conveyancing.

SALE OF GOODWILL OF SOLICITOR'S BUSINESS.

Annuity agreed to be granted to Retiring Partner of firm of Solicitors.

THE courts have on some occasions expressed their opinions against the legality of arrangements by which solicitors allow other persons, not being practising solicitors, to participate in the profits of the business, the objection being founded on the peculiarity of the solicitor's position as a privileged person authorised by statute to perform functions which none but certain persons are qualified to perform. In cases where the name of a former party is retained there seems also to be the objection that clients may be deceived by reposing confidence in a firm of which a particular party is believed to be a member, whilst in point of fact he has only lent his name on certain terms. We have now to call attention to the case of Aubin v. Holt (2 Kay and John, p. 166), where an agreement to grant an annuity to a retired partner who had allowed his name to be used by the remaining

partners was enforced by V. C. Wood, and expressly on the ground that the agreement was not *per se* illegal, though it might savour of illegality. It appeared that the plaintiff and defendant were in partnership as solicitors, and in 1848, they entered into an agreement which was in the following terms:—"We do hereby declare and agree our mutual positions to be as follows:—1st, That all partnership accounts between us up to the 29th of July, 1846, have been duly closed and settled. 2ndly, That since the 29th of July, 1846, the capital invested by the said George Douglas Aubin in our co-partnership business has become, and still is, the sole property of the said Henry Frederick Holt. 3rdly, That from the said 29th of July, 1846, the said H. F. Holt has been, and still is, entitled to the whole profits of the business carried on by him under the style of 'Holt and Aubin.' That in consideration of this agreement, the said H. F. Holt shall, from the 1st day of October next, grant unto the said G. D. Aubin a clear annuity of £300 during the life of his mother, Mrs. Elizabeth Aubin, he the said G. D. Aubin paying thereout all interest now or hereafter to become due by him to Mr. Chapman or his assigns. That all arrears of the annuity of £150 agreed to be paid to the said G. D. Aubin by the said H. F. Holt, according to the agreement of the 29th of July, 1846, have been fully paid and satisfied. That in the event of the decease of the said G. D. Aubin in the lifetime of his mother, the said Elizabeth Aubin, the said H. F. Holt shall pay to any widow the said G. D. Aubin may leave him surviving an annuity of £100 per annum during the life of the said Mrs. Elizabeth Aubin, on whose decease the said annuities to cease altogether. That in the event of the decease of the said H. F. Holt in the lifetime of the said Mrs. Elizabeth Aubin, the said G. D. Aubin shall be entitled to receive the sum of £500 in principal money out of the estate or property of the said H. F. Holt, and to the entire profits of the business of the said 'Holt and Aubin,' from the day of the decease of the said H. F. Holt. That the said H. F. Holt shall be permitted to carry on his business in the name and under the style of 'Holt and Aubin,' he indemnifying and guaranteeing the said G. D. Aubin from all liability in respect of his name being used as aforesaid. That at the decease of the said Elizabeth Aubin, the partnership between us to cease and determine." The defendant Holt continued to carry on the business as provided by the agreement, but the annuity having fallen into arrear, the solicitors of the plaintiff Aubin, wrote requesting payment of such arrears, and the execution of a proper deed within fourteen days, and

that if not complied with, proceedings would be taken. This request not having been attended to the plaintiff filed his bill praying that the defendant Holt might be ordered by deed or otherwise to effectually grant and secure to the plaintiff Aubin an annuity of £300 according to the said agreement, *and also to duly and effectually indemnify and guarantee the plaintiff from all liability in respect of such use of his name as aforesaid, and any further use thereof, and otherwise specifically to perform the agreement, and for an account and payment of what was due in respect of the said annuity or otherwise under the agreement.* In his judgment Vice-Chancellor Wood said:—"The plaintiff is entitled to have this agreement performed, for the agreement itself is in terms to grant an annuity, and is not such an instrument as he is entitled to have to secure the annuity. For this purpose the plaintiff is entitled to have a deed, and ought not to be left to his remedy at law upon this agreement, which may well be taken not to be an agreement to pay the annuity. With respect to the objection on the ground of public policy, the first observation on Lord Eldon's judgment in *Candler v. Candler*, (Jac. 225), is that it is in favour of this claim in one respect. He says that he had doubted the legality of similar arrangements, but was happy to find the Court of King's Bench to be of a different opinion in *Bunn v. Guy* (4 East, 190), though he never could entirely reconcile himself to their doctrine; and that it was one of the commonest things in the world, as I believe it is to this day, for a solicitor to retire from a firm leaving his name in it. The case of *Thornbury v. Bevil* (1 You. and Coll. Ch., 554), was of a different character. There a person, who had never been in the firm before, was brought in upon the retirement of one of the partners, under the name of the retiring partner; and being entirely a stranger in the business, he was allowed to use the name of an experienced person to launch him in the world, never having had any connexion with such person previously. That is a very different transaction from one partner in a firm retiring, and the name of the firm remaining unchanged. The agreement must be legal or illegal, and it is not within the discretion of the court to refuse specific performance because an agreement savours of illegality. It must be shown to be illegal. As to the account, the plaintiff has a right to have it taken as incidental to the other relief; and this court is not bound, instead of taking the account, to direct the deed to be antedated so as to include the arrears of the annuity."

THE LATE LORD TRURO.

WE have before shortly stated some of the circumstances occurring in the professional career of the late Lord Truro, and we avail ourselves of a somewhat extended and discursive notice of that personage in the last number of the *Law Review* to present further particulars, which will, we think, be acceptable to our readers. Few men have ever attained the highest rank in our profession whose merits have been more remarkable than were those of this eminent person. He was of humble extraction, but of a family in its station universally respected. His father had originally been an officer of the sheriffs of London, but having distinguished himself by his talents, his industry, and his strict and scrupulous integrity, he was by his professional friends induced to become a solicitor, and with that view served his time with one of the first houses in the city. He soon obtained extensive practice; and it may be added that to his professional pursuits he added those of a naturalist, many of his experiments and observations on different branches of zoology and entomology having met with great approval from scientific men. Thomas, his third son, was educated in his office, serving his clerkship to him, and afterwards to another house, to which his articles were transferred, and in which his independent spirit made him refuse a partnership which was offered; and he immediately established a house of his own. His success was great; no one, it is believed, ever made so rapid a progress towards the position of an attorney and solicitor in the first practice. Possessed of much business, and certain of speedily having the most brilliant fortune in the profession, it was a surprise to all that he should quit it—to all who were unacquainted with the character of the man; for there never existed, either in or out of the body to which he belonged, any individual so entirely devoid of all sordid propensities, it may even be said, so utterly careless of wealth, and to whom the pleasure of accumulation was so entirely unknown. It was a common remark among his friends, and made in all the periods of his life, that if, for any purpose of benevolence or of good works connected with public principle, you asked him to subscribe, he let you assess him, and gave frequently twice as much as was required.

He was called to the bar in 1817, and soon made rapid progress. This was set down in part, no doubt, to the account of his previous vocation, and the connexions which it could not fail to have made for him, as well as the familiarity with all matters of practice which it gave him, and indeed the experience of *Nisi Prius* as well as in *Banco*, which

it had enabled him to acquire under such men as Garrow, Gibbes, Holroyd, Abbot, for clients. But he no sooner was known in business at the bar than his great capacity for it appeared, even long before he became a leader. His familiarity with legal points, his acquaintance with mercantile matters, his powers of hard work, and the unequalled zeal for his client and his cause, which made him only grudge whatever might shorten the labour; all these qualities were very early remarked both by those who retained him and those who led him, and left no doubt of his rapidly reaching the highest station at the bar.

In 1820 he was employed as one of the Queen's counsel, when the Bill of Pains and Penalties, so disgraceful to all who instigated, so little creditable to those who supported it, to the country so disgusting, to the peace of the realm so perilous, was submitted to the House of Lords. He was the junior of the six advocates of her Majesty; and it used to be the saying of her Attorney and Solicitor-General, certainly when in a somewhat confident if not haughty mood, that they would make their sixth man walk round the counsel for the bill. From his position in the cause he had not many opportunities of supporting this boast; but in his few appearances before the House to argue points of evidence, and in his much more frequent opportunities of examining witnesses, he gave entire satisfaction; and in all that was done out of doors, whether in consultation or other preparatory measures, his zeal, his acuteness, and the sagacity derived from experience, as well as from his patient habit of mind, and, it may be added, his nature somewhat prone to suspicion, were invaluable to the cause. It is generally said in the profession, that in one or two of those few instances of difference among the counsel, when their leader decided against his colleagues, Mr. Wilde was of the same opinion with little or no hesitation, and the result entirely justified the resolution taken.

Soon after this memorable cause, which Lord Denman never would allow to be called a trial, because, he said, it outraged all the principles and rules of justice, Mr. Wilde was made a serjeant. He had recently distinguished himself by a most able argument in Chancery upon a bankruptcy case, which had been heard by the Lord Chancellor. When the Chancellor congratulated him upon the coif he said, "You will rise high in the Common Pleas, but you never will make a greater display of ability than you did last week in another court."

He did rise rapidly to the lead in the Common Pleas; and upon the Western Circuit he had probably a more entire possession of the first business, indeed of every variety of business, than

was ever held by any other leader of any circuit. This eminence he owed to no unworthy arts, whether of courting professional men or of undertaking a part of the attorney's duty, though from his experience in that walk of the profession no one was better able to render such extra assistance to his clients. But his absolute devotion to the cause in every instance be the subject matter great or small, his unwearied painstaking with all its details, his anxiety, his over-anxiety, respecting it at each stage of its progress, impressing his client with the feeling that it was the only cause he was engaged in, and not giving such impression desiguelly and with the view to court that approbation, but because his absorption in the cause and each of its minute particulars was real as it was entire,—this made him, and necessarily made him, such an advocate as every one deemed to be above all price. This, too, must be admitted to have caused one of the very few defects in his advocacy; he was apt to overdo matters; and it was said of him that the old habits of the attorney had never quitted him; he regarded every point in a cause, as not only equally material, but as the pivot on which it turned.

He was a powerful, because a clear, a thoroughly well-informed, a zealous speaker; never making any pretensions to oratory of a high description, but a most effective, business-like speaker. It must have been—from his excellent nature we have no doubt that it was—a source of pure gratification to him when he reflected upon the numberless occasions on which cases that appeared desperate to others had been successful in his hands, without any injustice done, any oppression suffered, any one deprived of his rights, but simply because those had obtained redress who with less sanguine, zealous, and laborious supporters must have failed to receive their due. The removal of such a man from the Bar was felt as the greatest loss which the body of practitioners could sustain; and their clients had good reason to entertain the same sentiments. It is not every man called to the Bar that can, by any exertion of diligence, attain the thorough mastery of the business entrusted to him which distinguished Serjeant Wilde: great natural acuteness was in him joined to a power of work and a love of it almost unequalled. But every one can make sure of attaining one quality, the first virtue of an advocate,—the sacrifice of every personal feeling to the interests of the client and the cause. It is impossible to conceive a more entire self-denial than this eminent person exercised upon every matter, great or small, in every case; and it seemed to cost him nothing, because he felt as if the case was his own rather than his client's. Now this

greatest quality of an advocate, ever to act as if he ever felt his representative capacity, may be possessed by all. No one ever saw in Serjeant Wilde the very least departure from it. No one ever could detect him either seeking self-display or wandering into mere matter of amusement, unless when the digression served the cause, as it sometimes may do either by conciliating the jury or exposing an adverse argument, or even by commanding attention in a dull and dreary case, and then it must be sparingly used lest it do more harm than good. Whoever listened to him perceived at every moment that he was working for the verdict or in Banc to satisfy the court his contention was right. If in this most important particular he ever erred, or for an instant seemed to forget the interests of the cause or the argument, it was from prejudice against the judge, in which he was somewhat too apt to indulge, and which really had its origin in his zeal for the client whom he conceived unfairly or carelessly treated. One whose zeal was so excessive and led him often into prolixity was very easily induced to think the impatience shown by the court oppressive to his client. Many exaggerated stories were current in Westminster Hall connected with this *foible* of the serjeant. Of one chief it was said that he required the impeachment, if not the head; of another, that he held his great qualities to make him the worse judge by giving him too much power. Some said that under the former he generally had blank bills of exception in his bag at Nisi Prius; and it cannot be denied that he was sometimes impatient of the practice of his leaders when they refused to tender such notice before another less eminent functionary. These things, however, are as nothing compared with his great and numerous merits. No man can be named whose clients more seldom suffered from any unfortunate *idiosyncrasy* of their advocate.

Reference has been made to his excessive labour, the elaborate manner in which he conducted his business. It was sometimes prejudicial to himself, beside its exhausting effects upon him; but it was the result of his honest nature, which not only grudged no pains but delighted in leaving no stone unturned to secure success. A friend of his, now high on the Bench, once drolly enough said that any suggestion of something being wanted would make him direct that there should be an affidavit from Calcutta. The course of business in his court (the Common Pleas) was seriously affected by the length at which he used both to examine witnesses and to address the jury. In another this might be set down to the account unfortunately supposed to be told by some men's practice, that the gratification of the attorneys in the cause, and the favour

of themselves among the bystanders, were consulted rather than the client's interest. But in the Serjeant's case such a suspicion would have been perfectly ridiculous, even to those who knew not the man; for he was in every cause, and he suffered seriously by whatever lessened the number of them disposed of at any sittings, or whatever in consequence of the state of the paper, kept business from the court. We have now stated all that can be urged in diminution of the ample, in some respects the singular, praise which it has been our duty to bestow on this great advocate in holding his example up to the admiration and imitation of the profession. There cannot be a more useful study for those who are entering upon its duties, and there cannot be a greater encouragement to industry and integrity, than the contemplation of it. His success was rapid, and it was complete. He rose to the highest stations on both sides of Westminster Hall; and ample as were his gains, he was only prevented by his generous nature and ignorance of all sordid feelings from realising a very large fortune.

His political opinions were always on the liberal side, and strongly so. But he wisely abstained from making any attempt to obtain a seat in Parliament until he had reached his eminent position as a leader, both on the Circuit and in court. He was returned for Newark, in 1831, having previously twice contested that borough without success. When the present Lord Chancellor, in 1839, was made a Baron of the Exchequer, he succeeded him as Solicitor-General. During the short time that he filled this office he gave the entire satisfaction, which might well be expected, to the government he served under; and no one could ever charge him, as so many crown lawyers have been charged, with neglecting his duty, whether in Parliament or elsewhere, for his private practice. But indeed before he held office, he had been a most useful, we need not add, zealous ally of the party to which he was from principle attached; and he distinguished himself upon some inquiries, such as that connected with Messrs. Raphael and O'Connell, in which the Government thought fit to take an extraordinary interest. One fact, however, ought to be mentioned with respect to his retaining office in 1841, because it both illustrates his high and honourable sense of duty to his political friends, and shows, in a very striking manner, the mischief of an administration retaining office without such a majority as enables them to discharge its duties. His friends, and especially his medical advisers, had strongly urged his retirement from the hard labours of the Bar,—labours, the effects of which upon a constitution by no means robust of late years, may be conceived when it is known that he

habitually went to chambers early in the morning after waiting there till late at night, sometimes passing not above four hours in bed. The expressions used, indeed, showed that they considered the relaxation pressed upon him as a matter of life or death. He was prevailed upon to take the same view of his case, and the chancellor was apprised that he was ready to take the place of a puisne judge, should it fall vacant. A vacancy did soon after occur, and the dangerous illness of Lord Cottenham made it necessary that communication should be had with the Prime Minister, contrary, of course, to the regular and constitutional mode of proceeding, but the deviation was unavoidable. Upon his entering the room, Lord Melbourne said, "Of course you must have the judgeship; but there is an end of the Government: for nobody else can carry Newark, and whether Erle or Talfourd succeed you, we lose another seat, which, with the majority of four or five that we now have, is fatal." The Serjeant at once saw both the position of the Government, and the consequences of its being known that he had been prevented from taking the promotion, almost as a matter of course belonging to his office if he desired it. He instantly perceived that a question would be put in Parliament as soon as the facts became known; and he as instantaneously resolved to prevent the possibility of this, by declaring that he came on no such errand as was supposed, and intended to remain a law officer of the Crown. Lord Melbourne felt strongly this truly noble conduct; and he felt the pain which the hard necessities of his position inflicted upon him, the more acutely because of the generous and delicate conduct of the Serjeant. The returns of the Treasury Secretary, however, left him no doubt as to the facts of the case; and the anger of his disappointed partisans he was unwilling to meet had he, as he certainly ought, refused to benefit at the Serjeant's expense. His observation upon the whole matter the same evening was, "This is about the most painful thing I ever endured: Office is not worth having at such a price."

Not very long after he was induced, by a like pressure of his partisans, to join at least in a slight to Lord Plunket. This movement made a vacancy in the office of Attorney-General; and Serjeant Wilde succeeded Sir John Campbell, now become Irish Chancellor for a few weeks. Whether upon this, or on his former re-election, we cannot state with certainty, but at one or the other, aware of the illegal expenses so often occurred in that borough, he had given distinct notice through more friends than one to the Treasury authorities, that he should, on no account, spend, or as far as he could

prevent it, allow to be spent, one farthing beyond the sums strictly required for necessary charges, and therefore perfectly legal. After a contest, as usual, severe, he was returned by a narrow majority; and some time afterwards was surprised to learn from a communication with a high quarter that some thousands of pounds had been expended, and a debt incurred to meet which there existed not any fund. His answer was a reference to the distinct notice which he had given, and a refusal to pay the money. But he was informed that it had been advanced by a supporter of the Government, who was also his personal friend, and whose ruin might be the consequence of the debt not being paid. We need scarcely add that this performance overcame all resistance, and the money was given.

The removal of the ministry in the ensuing autumn, the inevitable result of the general election; left Serjeant Wilde out of office, and member for Worcester, where he had been elected after being obliged to give up Newark. He continued his professional labours, with only the relief afforded by his quitting the circuit in consequence of having held the place of Solicitor-General. Yet the great request in which his advocacy was held, made this a less material relief than could have been wished; because he was often taken to different circuits on special retainers, and in the spring he had frequently to attend the House of Lords, and the Privy Council sittings of the Judicial Committee. In 1846, when the Whig Ministry were restored, he resumed the office of Attorney-General, which he had held for a short time in 1841; but now his tenure was still more brief: for the death of Sir Nicholas Tindal opened the Chief-justiceship of the Common Pleas; and he was immediately raised to that eminent place, which he held during four years.

JUSTICES OF THE PEACE.

(ante, pp. 256, 257).

SIR,—I was rather amused at reading the letter of your correspondent, Mr. Caius, which appeared in your last. It is rare in these days to find a defender of country justices, and I fear their present advocate will do the cause more harm than good.

It appears to me that he is a gentleman of very delicate sensibilities. The allusion in a former letter on this subject to the "big-bellied Squires" was too much for his feelings. So, after expressing his virtuous indignation thereat, he makes some delicate and witty allusions to stipendiary magistrates—to the "housekeeper's room"—to their being "foisted upon the public, there to batten and to feed"—and

finishes up these temperate and highly sensible remarks by, in effect, stating that the bar consists of a class of men fit only to "*gorge a comfortable and inexpensive dinner*" (another delicate expression!) All this is extremely amusing, but I really fear Mr. Caius, in his righteous ardour, has fallen into the very fault *he accuses* your former correspondent of. Both in coarseness and vituperation he far outstrips him.

As to his remarks upon the bar, I seriously would advise him to retain them for the future in his own bosom as precious gems of thought, for I fear no one is able to appreciate them, as they no doubt deserve.

Mr. Caius appears to have a mortal antipathy both to the bar and to *eatables*. He objects to stipendiary magistrates battenning and feeding, and to the bar "gorging" themselves, influenced probably by a tender regard for their health.

Now, Sir, I do not intend to go far into the subject of country justices here, as the matter has been handled by far abler heads and pens than mine. But a few words I will venture with your permission. Mr. Caius, referring to the former letter, says:—"It is a tissue of baseless and almost altogether unsupported assertion!" Need I contradict this? Need I refer to late cases? To the case of Jackson, the pawnbroker—to the great *pheasant* case, and one of the magistrate's letters in that case—to the case at Castle Eden, where a poor fellow being brought up for an assault, the magistrates' decision was: "*Now the evidence is not sufficient to convict you, so if you pay the costs we will discharge you; if you refuse to pay them we will fine you for the assault*"—to the case of the poor man mowing on Sunday? But why multiply instances. Mr. Caius compares stipendiary justices to country ones, and by some ingenious process best known to himself *twists* the comparison in favour of the latter. He tries to persuade us that barristers know less of law than country gentlemen! This is too absurd to need an answer. So much for Mr. Caius' letter.

I feel obliged to you, Sir, for having inserted the very sensible and well written article attacked by Mr. Caius in your periodical. I think, and not I alone, but all the country, that it is a subject and "*the spirit*" that should appear in the LAW CHRONICLE and in every other journal of the land (as, indeed, it does), until country justices become "*things that were.*" Why, Sir, it is become a household word in the country how justice (?) is dealt out by country justices!

Far be it from me to *run down* country magistrates, for I firmly believe that there are many of them sincerely anxious to do their duty *to the best of their ability*. But, Sir, I ask you, and every other unbiassed person, whether I am wrong in stating

that large landowners, as country magistrates often, indeed, generally are, whose interests as private gentlemen are necessarily mixed up with most of the cases that come before them, are not as fair and impartial judges as a stipendiary magistrate would be? Suppose an assault takes place—a child is to be afflicted—a poacher is caught—ten to one the assaulter or assaulted, the mother, or putative father, are some of the magistrates' tenantry, or the poacher has been on one of the justices' land. Small towns and villages are always divided into cliques and parties; and a magistrate living in or near them, and being intimately connected with them, is often influenced by party feeling; and I think a case is often decided before the justices enter the sessions room, in their own minds.

I have endeavoured to make these remarks temperate, and I trust I have succeeded, but I do sincerely hope that soon country gentlemen will keep to their horses and dogs, and vex the people no more.

I beg to remain, Sir,

Yours very obediently,

NORTH WALLIAN.

SOLICITORS AS JUSTICES OF THE PEACE.

We have before alluded (*ante*, p. 181), to the injustice inflicted on the profession by the refusal of the Lord Chancellor to appoint solicitors as justices of the peace for counties, and as this is a subject of some importance to the profession, we trust that some steps will be taken by them unitedly to have the injustice removed, or else that they should determine once for all, to submit to the Lord Chancellor's rule of exclusion. The present time is peculiarly a convenient one, as a bill has just been introduced into the House of Commons relative to the qualification of justices of the peace. Our readers scarcely require to be reminded that by the 6 & 7 Vic. c. 73, s. 34, solicitors are entitled to hold the office of justice of the peace in any city or town, being a county of itself, or in any city, town, cinque port, or liberty having justices of the peace by charter, commission, or otherwise; but the 33rd section excludes them *whilst practising*, from being justices of the peace for any county. It is admitted that an attorney, during his appointment as a magistrate, ought not to practise either at the quarter or petty sessions within the district for which he is appointed; indeed, many solicitors have very little practice of that kind, and would no doubt willingly relinquish it altogether. The Yorkshire Law Society, in their report of the 10th October last, state from the information they have collected: "That in 148 cities and boroughs at the time of the passing

of the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, and in the five years immediately preceeding, seventy-four practising solicitors were mayors, or chief officers of cities or boroughs, all of whom, or very nearly so, were justices of the peace by virtue of their office. Since the passing of that act, no less than 277 practising solicitors have filled the office of mayor, and consequently, in pursuance of the fifty-seventh section of the act, have been justices of the peace during the time of their holding such office, and the next succeeding year. Of these gentlemen, forty-three have held the appointment twice, thirteen three times, five four times, two five times, and one six times. At the passing of the Municipal Corporation Act, and in the five years immediately preceding, forty-eight practising solicitors were justices of the peace, exclusive of mayors. Since the passing of that act, forty-seven practising solicitors have been placed in the commission of the peace, and during the same period, in many places, including York, Lancaster, Hartlepool, Sudbury, Portsmouth, Congleton, Oswestry, Marlborough, and Bodmin, practising solicitors have been recommended by the town councils for the appointment, but have notwithstanding such recommendation, been excluded, whilst, in other places; such as Norwich and Lincoln, practising solicitors would have been selected, but the rule to exclude them was known and acted upon." It is stated that this exclusion rests upon a rule made by the Lord Chancellor, who issues the commission; but we think it originated with the Secretary of State for the Home Department, at what time we are not exactly aware. We concur in opinion with the Yorkshire Law Society, that the profession ought to ask for a legislative enactment, rendering the members of it generally eligible for the office of magistrate, not only in cities and boroughs, but also in counties,—and we presume there would be no objection to a clause prohibiting attorneys from acting professionally in general or petty sessions in the districts for which they act as magistrates. This course would meet every objection that can be justly made, on public grounds, to the appointment of solicitors. It appears that neither in Scotland nor Ireland is there any disqualification of solicitors to act as magistrates in counties similar to that contained in the 6 & 7 Vic. c. 78, although in Ireland the same grievance exists as in this country, although there is no legislative sanction for the exclusion.

MERGER.

COMMUNICATION ON THE LAW OF MERGER.

(ante, pp. 252—256).

I cannot see what distinction can be drawn (as far as regards the application of the law of merger) between incumbrances affecting the life estate and the remainder in fee (supposing both estates to vest in the purchaser by virtue of one joint conveyance). The same arguments will, I think, be applicable to both, and I cannot see how an exception can be drawn in either case to the general rule of merger, for the operation of which it is simply required: "That a greater and a less estate should coincide in the same person" (without any intermediate estate). The incumbrance itself (supposing it to be a mortgage) certainly confers an estate upon a third person, but then it is an estate commensurate (in point of duration) with the estate upon which it is charged, and therefore no "intermediate estate" capable of preventing the application of the rule in the present case. It is clear that, if the tenant for life and remainderman had conveyed to the purchaser by separate assurances, the doctrine in question would have applied; and if you deny it, simply because the conveyance is effected by a single instrument, why not deny it when the same conveyance confers an estate for life on A., remainder to his heirs, holding A. to take two distinct estates, one in possession, the other in remainder. But supposing it be granted that merger takes place in the case under discussion, does it follow (and this seems to me the vital question) that the anticipated effect will be produced? Mr. Burton, in his "Compendium of the Law of Real Property," says: "And if in any case the estate which is merged (which would be the fate of the life estate) were, either previously to the transaction which caused the merger, or by that transaction, charged with a rent or other incumbrance, the charge will still subsist, so long as the first estate might have continued, nor will even the accidental determination of the second estate before the time when the first estate (if it had not been merged) must have expired, cause the charge to cease" (see Burton's Compendium, 248, s. 765). Thus this writer virtually denies the natural tendency or power of merger to produce the equitable effect for the sake of which it is sought to be established, though the conclusiveness of the passage must of course depend upon the position which the author holds among text-writers.

A. L. TROTMAN.

EXAMINATION ANSWERS.

(Hilary Term, 1866).

COMMON LAW (*ante*, p. 271).

I. Lien—Statute of Limitations.—The Statutes of limitation as to *personal* actions (unlike those relating to real property) do not extinguish the right, but only bar the remedy. It follows from this rule, that a party having a lien on goods as a security for a debt does not lose his lien by reason of the statute of limitations having run against the debt. It is true the party cannot actively recover the money, but there is nothing to prevent his obtaining payment through the medium of his lien (see *Higgins v. Scott*, 2 Barn. and Adol. 413).

II. Sheriff—Claim to goods seized in execution.—Where a sheriff having seized the goods of a defendant under an execution is served with notice of a claim to such goods by a third party, he should forthwith apply to a judge at chambers or the court for an order or rule requiring the claimant to show his alleged title and for the plaintiff in the action and such claimant to proceed to litigate their respective rights on an issue; frequently the parties with a view to save expense leave the matter to the judge to decide upon the claim. This jurisdiction was given by the 2 Will. 4, c. 58, s. 6, which reciting that difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the courts of law, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers, proceeds to enact, "that where any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court [the 1 & 2 Vic. c. 45, s. 2, enables a judge at chambers to act, and indeed the application is usually made to a judge] from which such process issued, upon such application of sheriff or other officer, made as well before as after any action brought against such sheriff or other officers, to call before them, by rule of court [or judges summons], as well the party issuing such process, as the party making such claim, and thereupon to make rules, orders, and decisions for the adjustment of such claims and the relief and protection of the sheriff or other officer.

III. Distress on lodger's goods.—As a general rule everything on the premises, other than fixtures and

things attached to the freehold, whether belonging to the tenant or a stranger, is distrainable for rent. It follows, therefore, that the goods of a lodger may be distrained for rent due to the principal landlord, and this, even though the lodger had paid his own rent to his landlord.

IV. Notices to admit—New trial.—On a new trial the order for admission of documents made on a notice to inspect, prior to the first trial, will be binding on the party who consented to such admission.

V. Sequestration.—This is a kind of execution for a debt, and issues after a recovery of a judgment against a clergyman; it is directed to the bishop of the diocese in which the defendant resides, commanding the bishop to enter the rectory and parish church, and to take and sequester the same, and hold them until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he shall have levied the plaintiff's debt (2 Arch. Prac. 966; see 1 Law Chron. 380; in equity, 1 Law Chron. 238, 273).

VI. Summary remedies on bills of exchange.—In an action on a bill of exchange, commenced within six months of its becoming due, the defendant is not entitled to appear and plead as a matter of course: he must within twelve days, either pay the debt into court or apply to a judge for leave to appear and plead, showing on affidavit a legal or equitable defence, or such facts as could make it incumbent on the holder to prove consideration, or other facts satisfactory to the judge, who may then make an order on terms as to security or otherwise (*ante*, pp. 63, 65, 202; 18 & 19 Vic. c. 67).

VII. Execution after verdict.—In the absence of a direction to the contrary by the judge trying the cause, execution issues within fourteen days after the trial (15 & 16 Vic. c. 76, s. 120; Rule Hil. T. 1853, pl. 57; 1 Law Chron. 51).

VIII. Execution out of county of venue.—A plaintiff may now at once issue an execution into any county though a different one from that mentioned as the venue in the pleadings (15 & 16 Vic. c. 76, s. 121).

IX. Feme covert—Appearance by attorney—Pleading coverture, costs.—A feme covert cannot appear by attorney in an action against her solely and if she plead her coverture (which must be in person) and obtain a verdict thereon, she is entitled to her costs of the plea in abatement, and may have execution for such costs, in her own name; the husband cannot have execution for them in his own name without making himself a party to the judgment (*Wortley v. Rainer*, 2 Dowl. 637; Archb. by Chit. 1066, 1196); as to the power of the husband to issue execution, and the continuance of the authority

of the attorney, which however, only apply where the wife was sole at the time of the commencement of the action, see 15 & 16 Vic. c. 76, s. 141).

X. *Undertaking by attorney.*—If the attorney of a defendant undertakes to appear for him and afterwards neglects to fulfil such undertaking, an attachment may be issued against him (Rule Hil. T. 1853, pl. 3).

XI. *Warrant of attorney by two—Judgment after death of one.*—Where a warrant of attorney is given by two persons jointly (and not jointly and severally), on the death of one before judgment, no judgment can be entered up against the survivor (Raw v. Alderson, 7 Taunt. 453; Jordan v. Farr, 2 Adol. and Ell. 437; Prac. Com. Law 353).

XII. *Detinue and trover.*—The difference between detinue and trover is, that in the former the thing itself is sought to be recovered, whilst in trover damages only for the detention are sought (Key div. Com. Law Princ. pp. 35, 36; 3 Black. Com. 146; Walker v. Needham, 1 Dow. N. S. 220, 391).

XIII. *Bill of Exchange—Notice of Dishonour.*—Before the holder of a bill can sue the drawer or indorser thereof, he must give a notice of dishonour within the time limited by law for so doing, as to which see Key Div. Com. L. Princ. pp. 42, 43; 1 Law Chron. 342, 343).

XIV. *Contract by agent—Who to sue on.*—The proper party to sue on an oral, and even written contract, entered into by an agent of the contractee is the contractee himself, and not his agent, for in contemplation of law the contract is entered into by or with the principal. The rule is that a person on whose behalf or for whose benefit a simple contract has been entered into may maintain an action thereon, although he is no party thereto, provided the consideration upon which such contract is founded moves from him. The consideration draws after it the promise, so that the person from whom the consideration moves is the proper party to maintain an action upon the contract, although the promise be not in express terms made to him, but to another on his behalf (Browne's Actions, 160, 161; 9 Jur. 454; 2 Steph. Com. 119; Addison on Contracts, 257, 1st edit.; 1 Law Chron. 221—3, 394—6).

XV. *Rent—Execution—Notice by landlord to sheriff.*—An application may be made to the court, or an action on the case be brought against the sheriff for removing goods seized in execution from off the premises without satisfying the landlord for a year's rent (after notice), under 8 Anne, c. 14 (see ante; Reed v. Thoyts, 6 Mees. and W. 410; Riseley v. Ryle, 10 Mees. and W. 101). The statute requires the payment of the rent before the goods are removed from the premises; and if, therefore, they be sold and removed, the sheriff

will be liable for the whole amount of the rent due, although the goods may have been sold for less (Foster v. Hilton, 1 Dowl. 35). But a bill of sale by the sheriff is not a removal (Smallman v. Pollard, 6 Man. and Gran. 1001; S. C. 8 Jur. 246; recognised, 12 Jurist, 896). The sheriff, in order to be made liable, must have notice of rent being due (Smith v. Russell, 3 Taunt. 400); but if this notice be given at any time whilst the goods or their produce are in the hands of the sheriff, it will be sufficient (Arnitt v. Garnett, 3 Barn. and Ald. 440). Even where a sheriff, knowing that rent was due to a landlord, proceeded to sell the tenant's goods under a *fi. fa.* without retaining the rent, he was holden to be liable for it to the landlord under this statute, although no specific notice had been given to him by the landlord that such rent was due (Andrews v. Dixon, 3 Barn. and Ald. 440). The sheriff should not seize for rent until he has notice thereof (Gawler v. Chaplin, 2 Exch. Rep. 506; *sed quære*).

CONVEYANCING (ante, pp. 271, 2).

I. *Escheat of freehold and copyholds.*—Where a man seised of lands in fee dies intestate without heirs, the lands whether freeholds or copyholds escheat to the lord, who is usually a different person in such cases. Where the owner of freeholds dies intestate without an heir, the Crown will be entitled to such lands. Where the owner of a copyhold estate dies intestate without leaving an heir, the lord of the seignory will take the copyhold. The means by which the Crown and lord respectively become entitled, are by the doctrines of *escheat* (see Downe v. Morris, 8 Jur. 486; Weaver v. Maule, 2 Russ. and Myl. 97). The existence of a legal estate in a trustee would prevent the escheat, as has lately been decided.

II. *Estates tail male, general, and special.*—In creating the following estates, the words of limitation in deeds in each case are as follows:—1. Estate in tail male, "to A. and his heirs male of his body begotten." 2. Estate in tail general, "to A. and his heirs of his body begotten." 3. Estates in tail male special, "to A. and the heirs male of his body to be begotten upon B., or "to B. and the heirs male of her body to be begotten by A.," or "to A. and B. and the heirs male of their bodies" (Doe v. Featherstone, 1 Barn. and Adol. 944).

III. *Bargain and sale to uses.*—On a bargain and sale to A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs, the legal estate vests in A. and his heirs, because the bargain and sale is but the limitation of a use and there cannot be a use upon a use. On a conveyance operating by transmutation of possession and so passing a

seisin the case is very different (Key, div. Conveyancing, pp. 123, 124; *ante*, pp. 195, 228; 1 Hay. Conv. 37, 53, 74, 5th edit.; 2 Black. Com. 338).

IV. *Incorporeal hereditaments*.—An incorporeal hereditament is a right issuing out of a thing corporeal (whether real or personal), or concerning, or annexed to, or exercisable within the same, being descendible to heirs. It is not the corporeal thing itself, but something collateral thereto, as a rent issuing out of lands. Some writers rank reversions and remainders as incorporeal hereditaments, and certainly in respect of the mode of their conveyance they are governed by the rules applicable to the transfer of incorporeal hereditaments. But to include them under such term is to confound the estate which may be had in the subject of property with the subject of property itself. The term is usually confined to things *real*, but it also applies to things *personal* as in the case of an annuity descendible to a man and his heirs, but as this is the only instance of the kind, the term "incorporeal hereditament" is, in effect, exclusively applied to the class of things *real*; and may in such case be defined as a right annexed to, or issuing out of, or exercisable within, an hereditament corporeal of that class. The use of the term "incorporeal hereditament" is objectionable, for a man may have a less estate than an hereditament in an incorporeal thing. The preferable term is an "Incorporeal Right," or better still "Mixed Property" (1 Steph. Com. 159, 1st ed.; pp. 163, 614, 2nd ed.; 2 Black. Com. ch. 8; 1 Prest. Est. c. 1; First Book, 132, 133; see 1 Law Stud. Mag. 311—313). Incorporeal hereditaments are usually (as indeed are corporeal) conveyed by grant (Key, div. Conv. p. 107; 1 Steph. Com. 474; 2 *Id.* 54, 1st edit.; Bird v. Higginson, 6 Adol. and El. 824).

V. *Emblements*.—Emblements are corn sown and roots planted in, and other annual artificial profits of the land, which pass to a man's personal representatives on the determination of an uncertain tenancy (Toller's Exec. 149, 150; 2 Black. Com. 122). We have so recently fully answered a similar question that we must refer thereto in 1 Law Chron. 365.

VI. *Death of executors in testator's lifetime*.—The death of all the executors in the lifetime of the testator is the same as if a testator had not appointed any executors by his will, and therefore administration must be granted with the will annexed. The person or persons having the greatest interest in the deceased's effects will, in the absence of peculiar circumstances, be entitled to such administration (1 Will. Exec. 381).

VII. *Estoppel—Escrow*.—We have already (1

Chron. p. 51), given an answer to the question so far as estoppel is concerned: we now, however, furnish another. Estoppels are so called according to Lord Coke (1 Instit. 352 a, and see note by Butler), "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." This rule proceeds on the ground that it is but just, in the language of Taunton, Just. (Powman v. Taylor, 2 Adol. and Ell. 291), "that where a person has entered into a solemn engagement by deed, under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted," or as Lord Denman, C. J. expresses it (6 Adol. and Ell. 475), "that where a person by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own position, the former shall be precluded from averring against the latter a different state of things as existing at the same time" (see Comyn's Dig. tit. "Estoppel," and authorities referred to in note to 1 Steph. Com. 446, 1st edit.; 3 Jur. 555; 5 Jur. 858; Freeman v. Cooke, 12 Jur. 777; Doe v. Challis, 15 Jur. 900). A recital will bind by estoppel, and will bind all the parties to an indenture, unless it clearly appears to be intended to be the statement of one only of the parties (Stronghill v. Buck, 14 Jur. 741; S. C. 19 Law Journ. N. S. Q. B. 209; Young v. Raincock, 18 Jur. 539; as to estoppel by admissions, see Newton v. Liddiard, 13 Jur. 253). As to that part of the question which relates to an escrow (or a scroll), we may observe that the delivery of a deed may be *conditional*, as a delivery to some third person to keep *till some act is done by the grantee*; in which case it is not delivered as a deed, but as an *escrow*, that is, it is not to take effect, or to operate as a deed till the act required to be done by the grantee is actually performed. Delivery of the deed as an escrow vests the right to the deed in the party for whose benefit it is delivered, subject to the performance of the condition on which it is delivered (Hooper v. Ramsbottom, 6 Taunt. 12; Shepp. Touchst. 57, note h, by Atherly; Bowker v. Burdekin, 11 Mees. and W. 128).

VIII. *Settlement—Custody of title-deeds*.—In the case of a settlement to the use of A. for life, remainder to the use of trustees for terms of years to raise jointures and portions, remainder to the use of the first and other sons of A. successively in tail, the party entitled to the custody of the title-deeds is the trustee having the legal estate, if any such there be; but if not, i. e., if the tenant for life take a *legal* estate, he will be entitled to the custody of the deeds (see Dixon on Deeds, p. 77, *et seq.*; 1 Sand. Uses. 118, 5th edit.; Jenkin v. Peace, 6 Mees. and W. 722; 2 Pow. Mortg. 641, 5th edit.;

Evans v. Bicknell, 6 Ves. 174; *Harper v. Faneder*, 4 Madd. Rep. 138; *Hill's Trustees*, 258, 382).

IX. Advowson—Presentation by purchaser of.—A person cannot lawfully present himself to a living the next presentation to which he has purchased; this is by 12 Anne, st. 2, c. 12; if the purchase were of the advowson itself, there is some doubt whether it would be illegal (see 1 Chron. p. 180).

X. Bill of sale, registration.—To make a bill of sale of chattels good it must, except in the cases otherwise provided, be registered or filed within twenty-one days (17 & 18 Vic. c. 36; 1 Law Chron. 136, 195, 280).

XI. Mortgages, provisos, covenants, and powers.—The usual provisos, covenants, and powers in a mortgage in fee are for redemption of the premises on payment of the principal and interest at a certain time, for retention of possession by the mortgagor till default in payment, for payment of the principal and interest and for title, and, if houses, &c., to insure, with powers to sell on default either with or without notice, and, if desirable to lease (see Key, div. Conveyancing, pp. 76—78).

XII. Purchases by trustees, &c.—There are several relations in which persons may stand towards each other which forbids a purchase by either of them, either entirely, as by reason of legislative enactments or on general principles of public policy, or partially, as where the interests of the parties have in reality been sufficiently guarded (*Dart*, 8, 16, 2nd edit.); as purchases by arbitrators, bankruptcy or insolvency assignees, trustees for purchase; also partially, agents, auctioneers, counsel, solicitors, guardians, &c. (*Dart*, 16—21, 2nd edit.; 1 Law Chron. 89, 439; 2 *Id.* 49, 245).

XIII. Covenants for title—Trustees.—A beneficial vendor seised in fee covenants—1st, that he is seised in fee; 2ndly, that he has power to convey; 3rdly, for quiet enjoyment by the purchaser, his heirs and assigns; 4thly that the estate is free from incumbrances; and lastly, for farther assurance. In small purchases the first covenant is sometimes omitted, which may be safely done, for the first and second are synonymous covenants. Where a vendor has only a power of appointment, the vendor should, in addition to the above, covenant that the power was well created, and is subsisting. In cases of trustees and executors the covenants are different. They can only be required to covenant that they have done no act to encumber. Where the purchase money is considerable it is usual to require the *cestuis que trust* to join.

XIV. Devise to heir-at-law.—The devisee heir-at-law takes by devise, i. e., by purchase. This is expressly enacted by the Inheritance Act (3 & 4 Will. 4, c. 106, s. 3), the words of which are: "That

when any land shall have been devised by any testator who shall die after the 31st of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent." It was a clear rule that the heir would take by descent, as being his preferable title (*Watk. Conv. by Merrifield*, 170; 4 Bac. Abr. 315, by Gwillim; *Burton's Comp.* pl. 336).

XV. Descent.—The third of the estate in joint tenancy goes on B's death to the surviving joint tenants; the third of those in coparcenary and in common goes to his heirs.

EQUITY (*ante*, p. 272).

I. Principal equitable subjects.—By way of addition to what is stated 1 Law Chron. pp. 259, 433, and *ante*, 194, 195, we may give Mr. Smith's statement of the subjects of equity jurisdiction, namely, I. Remedial equity, specifically so termed, including thereunder: 1. Accident; 2. Mistake; 3. Actual fraud; 4. Constructive fraud. II. Executive equity, including thereunder: 1. Legacies; 2. *Donationes mortis causa*; 3. Express private trusts evidenced by some written document; 4. Express charitable trusts; 5. Implied trusts; 6. Constructive trusts; 7. Trustees and others standing in a fiduciary relation; 8. Specific performance of agreements and duties not arising from trusts. III. Adjustive equity, including thereunder: 1. Account in general; 2. Administration; 3. Mortgages and pledges; 4. Apportionment and contribution; 5. Partnership; 6. Certain special adjustments in cases of debtor and creditor; 7. Miscellaneous cases of account; 8. Damages and compensation; 9. Election; 10. Satisfaction; 11. Partition, settlement of boundaries, and assignment of dower. IV. Protective equity, irrespective of disability, including thereunder: 1. Cancelling, &c., documents; 2. Interpleader; 3. Bills of peace, and to establish wills, and injunctions; 4. Writs of *ne exeat regno* and *supplicavit*; 5. Appointment of a receiver, &c. V. Protective equity in favour of persons under disability, including thereunder: 1. Infants; 2. Persons of unsound mind; 3. Married women. VI. Auxiliary equity, including thereunder: 1. Discovery in aid of proceedings at law; 2. Preserving testimony.

II. Relief against forfeiture, lease.—Equity never relieves against a breach of covenant in a lease unless the payment of money will be an adequate compensation, and the party can be put just in the same position as if no breach had been committed (*Princ. Eq.* 388—390; *Elliott v. Turner*, 13 Sim. 477; 5 Jur. 1178). Thus a neglect to insure will not be relieved against, as the lessor cannot be put in the

same condition, as the risk by non-insurance is not a matter of calculation.

III. *Specific performance of contract not in writing.*—Courts of equity will decree specific performance of a contract relating to land where there has been a part performance of the agreement, as to which see 1 Law Chron. 438-9, though not in writing.

IV. *Tenant for life—Waste.*—A tenant for life, though unimpeachable of waste, will be restrained from making an unconscientious use of his legal power; as where he is pulling down the mansion house, young timber, trees planted for ornament, &c. (1 Law Chron. p. 55).

V. *Estate for life with or without impeachment of waste.*—A tenant for life expressly "without impeachment for waste" is not liable at law for such acts of waste as ordinary tenants are responsible for.

VI. *Stock—Restraining unlawful transfer.*—In order to prevent any improper transfer or dealing with stock standing in the name of a third party, a *distringas* should be at once placed on it. The writ may be obtained on filing an affidavit; an order to restrain the transfer may be obtained by motion or petition, without a bill being filed, which, however, will be necessary if the party requests the bank to transfer (5 Vic. c. 5; Pract. Eq. 452-456; Key, div. Equity, p. 122; Hertford v. Suisse, 1 Hare, 584).

VII. *Infant—Ward of court.*—An infant is made a ward of court by a suit being instituted on his behalf; thereupon the infant is placed, as to his property, under the immediate protection of the court, and a guardian is appointed for his or her person only: the court will then treat all persons offending against its orders with severity as for a contempt (Key, div. Equity, pp. 47, 48; 1 Law Chron. 124, 200, 204, 296, 298, 376).

VIII. *Relief of trustee.*—A trustee may file a bill to have the trusts performed and so relieve himself from the performance of his trusts, and if only a derivative trustee to be relieved from the trust. If the trust estate consist of monies or stock he may pay same into court, and so be relieved (1 Law Chron. 54, 123, 304, 375, 416, 439).

IX. *Instituting proceedings in Chancery.*—There are three modes of commencing proceedings in Chancery (besides the proceeding by petition in certain statutory cases), namely: 1. By a bill, which is the ordinary way in the case of a subject, or by an information in the case of the Sovereign suing, or a public right being in question; 2. By a claim, which, however, only applies to the ordinary cases of administration, foreclosure and redemption of mortgages, specific performance of agreements, partnership accounts, compelling trustees to allow their names to be used by the *cestuis que trust* in enforcing

legal claims, and for the appointment of new trustees (1 Law Chron. 439). Even in these cases bills may be, and very frequently are, filed, though the court might in a very plain case disallow the additional costs (see 2 Law Stud. Mag. N. S. p. 150). The third way of commencing a suit in equity is by a summons, which however is limited to the single case of an administration, and in the case of *real* estate only where the will vests the *whole* of the real estate in trustees for sale, with power to give receipts for the rents and produce (15 & 16 Vic. c. 86, ss. 45, 47; 1 Law Chron. 54, 262, 408).

X. *Suit on behalf of infant or feme covert.*—Before an infant, married woman, &c., can sue as plaintiff in a bill or claim, a next friend must be appointed, and a written authority must be obtained from such next friend, and be filed with the bill or claim (15 & 16 Vic. c. 86, s. 10).

XI. *Steps in a cause.*—We have answered this so recently as *ante*, p. 196, to which we therefore refer the reader.

XII. *Modes of taking evidence.*—This is also answered *ante*, p. 196.

XIII. *Proceedings by creditor or legatee.*—A creditor or legatee may obtain payment of his debt or legacy in Chancery by filing a bill or a claim or by obtaining an administration order. As to this latter there is a distinction between personal and real estate; for an administration of the *personal* estate of a deceased person may be obtained by a judge's summons and order at the instance of a single creditor, legatee, or next of kin. An administration of the *real* estate may be obtained by a creditor or person interested under the will of the deceased, where the *whole* of the real estate is vested in trustees for sale, with power to give receipts (15 & 16 Vic. c. 86, ss. 45-48; Ord. of 16th Oct., 1852, pl. 3-7; 5 Law Stud. Mag. N. S. 672).

XIV. *Abatement—Revivor.*—By sec. 52 of the 15 & 16 Vic. c. 86, upon a suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, an order to revive may be obtained as of course upon the allegation of any such matters. On service of this order the suit stands revived. The order may be discharged on any ground which formerly would have been open to the defendant on a bill of revivor or supplemental bill. Where any party is an infant or lunatic, a guardian must be appointed (see 43rd Ord. of 7 Aug. 1852; 4 Law Stud. Mag. N. S. p. 464; 6 *Id.* 89-92; 1 Law Chron. 832).

XV. *Business at chambers.*—We have before (1 Law Chron. 260, 439) stated some of the matters disposed of at chambers; we may add that the

tendency is to throw as many things as possible into chambers. The matters of relief sought for by proceedings at chambers are, 1. the administration of assets; 2. the guardianship, advancement and maintenance of infants.

BANKRUPTCY (*ante*, p. 272).

I. *Objects of bankruptcy law.*—The principal objects to be effected under the bankruptcy law are to make an equal distribution of the trader's effects among his creditors, so as to prevent single creditors from obtaining that preference over others which the common law allows, and thereupon to free the trader from all further liability, so as to enable him to commence the world anew (Key, *div. Bankruptcy*, p. 2; *ante*, p. 28).

II. *Obtaining adjudication.*—An adjudication is obtained either on the petition of a creditor (as to which see *ante*, pp. 212, 213), or on that of the trader himself, as to which see 1 Law Chron. 153, 440, 441).

III. *Facts to be proved by petitioning creditor.*—Where a creditor petitions for adjudication against a debtor he must establish the existence of a sufficient petitioning creditor's debt, of a trading within the meaning of the bankrupt laws, and of an act of bankruptcy by the trader (Key, *div. Bankruptcy*, pp. 46, 49).

IV. *Disputing adjudication.*—A trader may dispute the adjudication either before or after the advertisement thereof, so that he does so within the limited periods. Where he disputes prior to the adjudication he is allowed seven days, or such extended time, not exceeding fourteen days, as the court shall allow from the service of the duplicate of the adjudication to show cause to the court (the commissioner) against the validity of the adjudication. After the advertisement of the adjudication the bankrupt must (if he were within the United Kingdom at the time of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the *London Gazette*, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding, to dispute or annul the petition for adjudication, and shall not have prosecuted same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that he became bankrupt before the date

and filing the petition for adjudication, and that such petition was filed on the day on which the same is stated in the *Gazette* to bear date (12 & 13 Vic. c. 106, s. 233).

V. *Mode of proving debts.*—Debts are proved by the creditor, where he is living near the place where the court is held, attending and making a deposition of his debt, in which he must state the particulars of and consideration for his claim, and that the debt was due and owing before the filing of the petition, or has since become payable, and if the creditor hold any security he must state that fact and produce the document. If any creditor live remote from the place of the meeting of the commissioners, he may prove by affidavit, sworn before one of the parties elsewhere stated as authorised to administer an oath in bankruptcy matters. It has been held that though the 164th section of the Consolidation Act does not provide for proof by affidavit, and there is no express provision in the act dispensing with personal attendance, creditors in the country may prove by affidavit (2 Law Stud. Mag. N. S. p. 4).

VI. *How property vested in assignees.*—The bankrupt's property (except as to copyholds, estates tail, and leaseholds before assent) vest in the assignees by the mere appointment (*ante*, pp. 261, 262).

VII. *Property not passing to assignees.*—The following are some instances where goods do not pass, and, consequently, in such instances no order can be made for their sale by the assignees as being in the reputed ownership of the bankrupt. Thus, where the bankrupt has property in his possession in *autre droit*, it does not pass to the assignees. As where he is a trustee, or executor, or administrator (Winch v. Keeley, 1 Term Rep. 619; exp. Ellis, 1 Atk. 101; Sinclair v. Wilson, 1 Law Chron. 458). So property in his possession as factor for another, will not pass to the assignees (2 P. Will. 187, *note*; Cowp. 238). Nor will property placed in the bankrupt's hands for a specific purpose (exp. Froud, 1 Mont. and Mc Ar. 262; Hamilton v. Bell, 1 Law Chron. 350). So monies, securities and effects, belonging to properly enrolled friendly societies, &c., do not pass to the assignees (6 Madd. R. 98; exp. Ray, 2 Deac. 537). So goods obtained by fraud (15 Mees. and Wels. 216), or in the trader's possession in conformity with the known usages of trade (16 Mees. and Wels. 212), and goods settled to the separate use of the wife (16 Mees. and Wels. 838), do not pass to the assignees, *i. e.*, they cannot be sold under a commissioner's order. See as to this order, 3 Law Stud. Mag. N. S. p. 250—252.

VIII. *Fraudulent preference.*—In order to constitute a fraudulent preference, it should be shown that the transaction was voluntary, made in contemplation of bankruptcy, and with a view to prefer the

particular creditor. "The proper definition of a fraudulent preference is, a voluntary preference moving from the bankrupt in favour of a particular creditor, and in contemplation of bankruptcy." (Per Parke, J., in *Morgan v. Brundett*, 2 Nev. and Man. 287; S. C. 5 Barn. and Adol. 298; see 2 Law Stud. Mag. 239, 240; 6 *Id.* 251; 2 *Id.* Supp. pp. 54, 56; *Hobson v. Browne*, 1 Jur. N. S. 920).

IX. Settlements by bankrupt.—A settlement by a trader made before bankruptcy, and in consideration of a future marriage, is valid, even if the husband were then indebted and even if the goods were his own and not his intended wife's (2 Madd. Chanc. Pract. 368; *Simmonds v. Edwards*, 11 Jur. 592; S. C. 16 Mees. and Wels. 888). But a settlement after marriage (not being in pursuance of written articles prior thereto, which is, indeed, the same as an actual settlement) by a trader being at that time greatly in debt, or becoming so shortly afterwards, is invalid as against then creditors and the assignees, unless supported by a valuable consideration (*Pott v. Todhunter*, 9 Jur. 589; S. C. 2 Coll. C. C. 76; 2 Law Stud. Mag. N. S. Supp. pp. 180, 181). So much with reference to the bankrupt's own marriage settlement; but in the Consolidation Act there is a provision relating to settlements on his children and other persons (which latter words, it is said, are intended to comprise his wife) (*Glaister v. Hewer*, 8 Ves. 204). This is sect. 126 (which is the same as sect. 78 of the 6 Geo. 4, c. 16), and it enacts that if any bankrupt being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children or to any other person any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bonds, bills, notes, or other securities, or have transferred his debts to any other person, or into any other person's name, the commissioners may, notwithstanding, effectually sell and dispose of the same for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him.

X. Bankruptcy of one partner.—The bankruptcy of one of several partners causes a dissolution of the partnership; if adjudication be obtained for that purpose it may be nullified (*Key*, div. "Bankruptcy" p. 55).

XI. Appeal.—An appeal may be made from the decision of a commissioner to the Lords Justices in Equity, and from them to the Lords on "matters of law or equity or on the rejection or admission of evidence" (12 & 13 Vic. c. 106, ss. 12, 14; 14 & 15 Vic. c. 83, ss. 7, 10; *Key*, div. Bankruptcy, p. 10;

1 Law Chron. p. 276). The appeal from the commissioners to the Lords Justices may be on any matter over which the latter have jurisdiction.

XII. Certificate.—Before a bankrupt applies for his certificate he must have passed his last examination (12 & 13 Vic. c. 106, s. 198). The commissioner acting in the prosecution of the bankruptcy grants the certificate of conformity, but any creditor may be heard to oppose same on giving three clear days' notice of his intention to oppose. In order to obtain a certificate the court (commissioner) appoints a public sitting for the allowance thereof; an advertisement thereof is then inserted in the *London Gazette*, and notice thereof given to the solicitor of the assignees, twenty-one days before the sitting. The assignees, or a creditor, having given due notice, are then heard to oppose, and the court either grants, or refuses to grant, or suspends the certificate.

XIII. Classes of certificate.—A bankrupt's certificate of conformity may be (1) one of a first class, which is granted where the bankruptcy has arisen from unavoidable losses and misfortunes, or (2), one of a second class, i. e., where the bankruptcy has not wholly arisen from unavoidable losses and misfortunes, or (3), the certificate may be of a third class, which is where the bankruptcy has not arisen [in any part] from unavoidable losses or misfortunes (see 12 & 13 Vic. c. 106, s. 199, and Schedule Z). In pursuance of this act, the commissioner in allowing a certificate certifies thus: "And I further certify that his bankruptcy has arisen from unavoidable losses and misfortunes, and that he is entitled to, and I do award him, this certificate as of the first class; or, [that his bankruptcy has not wholly arisen from unavoidable losses and misfortunes, and that he is entitled to, and I do award him, this certificate as of the second class;] or, [that his bankruptcy has not arisen from unavoidable losses or misfortunes, and that he is only entitled to, and I do only award him, this certificate as of the third class]."

XIV. Property acquired by certificated bankrupt.—Property coming to the bankrupt prior to his certificate goes to his assignees; if subsequently then the bankrupt is entitled thereto (12 & 13 Vic. c. 106, ss. 141, 142; *Key*, div. Bankruptcy, p. 83).

XV. Creditors accepting composition.—A bankruptcy opened may be stayed after the bankrupt has passed his last examination, if nine-tenths in number and value of the creditors assembled at two advertised meetings will agree to accept a composition. Upon the acceptance of such offer being testified to the court in writing, it may annul the adjudication, and dismiss the petition for adjudication. All the creditors are bound to accept the

agreed composition (12 & 13 Vic. c. 106, s. 230). There is no other jurisdiction to annul with consent of creditors, but if every creditor consents, such an order will be made *quantum valeat* (Exp. Luxford, 1 Fonbl. N. R. 261; exp. Harris, *Id.* 262).

CRIMINAL LAW (*ante*, p. 273).

I. *Proceedings to trial*.—This question excludes the summary jurisdiction of justices, as lately provided for, and relates to matters sent by justices for trial. The first proceedings against a person accused of an offence in order to bring him to trial is to summon, or, in serious cases to arrest, the party and bring him before a justice (1 Law Stud. Mag. N. S. 37, 38); the party is then either discharged, or remanded (*Id.* 39), or committed for trial, in which latter case he is committed to prison or discharged on bail (*Id.* 39, 40). The bailment and depositions are then certified to the proper officer (*Id.* 40). Then, or instead of these proceedings, the prosecutor may prefer his bill before the grand jury. If the bill be found, the party is called on to plead, which he does, and is then tried, unless under the 14 & 15 Vic. c. 100, s. 27, the trial is adjourned to a subsequent session (see 3 Law Stud. N. S. p. 242).

II. *Bail*.—It is assumed that this relates to bail by justices of the peace, who may bail in felonies, false pretences, receiving stolen property, perjury, concealing birth, indecent exposure of the person, riot, assault, or any misdemeanor, the costs of prosecuting which are payable out of the county rate; he *must* admit to bail in other indictable misdemeanors. He cannot bail for treason, and he will not generally do so in cases of murder, or other serious felonies (First Book, 422, 423; 11 & 12 Vic. c. 42).

III. *Bail, murder*.—A justice of the peace may admit to bail a person charged with murder, but this is not usually done; in such case application is made to the Court of Queen's Bench, or a judge thereof (First Book, 422, 433; 11 & 12 Vic. c. 42; 2 Law Stud. Mag. N. S. p. 336).

IV. *Amending defects in indictment at trial*.—By sec. 1 of the 14 & 15 Vic. c. 100, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein

stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such an offence, or in the christian name or surname, or both christian name or surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described (1 Law Chron. 277), or in the ownership of any property named or described therein, the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, may order such indictment to be amended according to the proof both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable.

V. *Appeals—Special Case*.—Questions of law in criminal cases may be submitted to the consideration of the judges at Westminster, by a special case which is to be signed by the judge trying the case and transmitted to the court above. This was formerly done on trials before judges of assize, but not at sessions, but now a case may be stated from any criminal court (12 Jur. 942).

VI. *Larceny and embezzlement*.—Larceny at the common law is the unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same, and not being committed under the circumstances requisite to make it burglary (4 Steph. Com. 152, 153, 1st edit.). Larceny, or theft, is distinguished by the law into two sorts; the one called *simple larceny*, or plain theft unaccompanied by any other atrocious circumstance: and *mixed or compound larceny*, which also includes in it the aggravation of a taking from one's person or house. Simple larceny is defined to be the felonious taking and carrying away of the personal goods of another (1 Cr. Law Rep. Dig. L. of Theft). Formerly a stealing of goods above the value of 12d. was denominated grand larceny; if of, or under that value, petty larceny; but this distinction is abolished by 7 & 8 Geo. 4, c. 29, s. 2 (4 Stewart's Com. c. 7; First Book, 394). Embezzlement is where one in a public trust, or as a servant, receives and fraudulently appropriates money or goods received for public purposes or for his master, without the same having been in the possession of the party entitled thereto (Dickinson's Quart. Sess. 261, 355, 5th edit.).

VII. *Criminal Information*.—Criminal informations are proceedings in which, although the Queen

is the nominal prosecutrix, yet she is so at the relation of some private person or common informer; and they are filed by the Queen's coroner and attorney in the Court of Queen's Bench, formerly also by the master of the Crown Office, who is for this purpose the standing officer of the public (6 Vic. c. 20; 4 Black. Com. 808, 809; 4 Stew. Com. 864; 4 Steph. Com. 408, 2nd edit.; Archb. Crim. Plead. and Evid. 71, 8th edit.). To proceed by way of a criminal information a rule nisi is obtained by application (by counsel only) to the Court of Queen's Bench upon affidavits stating the circumstances upon which the complainant seeks to proceed by this extraordinary method. These must not only charge the defendant with such a crime as will justify the court in interfering, but must, in general, show the innocence of the party complaining, and that his motives are honourable and sincere. Where an information is sought against a magistrate a notice of the motion should be given, and the motion must be made within two terms at least, and early enough to allow of cause being shown before the end of such second term. And even in the case of a private individual the complaint should be made as early as possible, and any delay should be accounted for (2 Barnard. 284; 4 Term Rep. 465, 290; 1 Chit. Crim. Law, 856, 875; Reg. v. Saunders, 10 Qu. Ben. Rep. 484; S. C. 1 Abr. Crim. Cas. 49).

VIII. *Mandamus*.—The writ of *mandamus* is denominated a prerogative writ, and is in the form of a command as from the Queen herself. It is issued from the Court of Queen's Bench, and is directed to any person, corporation, or inferior court of judicature (as to justices of the peace, see 11 Jur. Dig. 119; 11 & 12 Vict. c. 44, s. 5), within the crown's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of Queen's Bench has previously determined, or at least supposes, to be consonant to right and justice. It lies to compel the admission or restoration of the applicant to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting house, or the like; and it will be also granted for the production, inspection, or delivery of public books and papers; to compel public companies to summon a jury to assess compensation for lands taken under their acts (12 Jur. 978); for the surrendering of the regalia of a corporation; to oblige bodies corporate to affix their common seal; or to compel the holding of a court, or to proceed to an election in corporate and other public offices (11 Geo. 1, c. 4; and 7 Will. 4, and 1 Vic. c. 78, s. 24; R. v. Mayor, &c., of London, 1 Term Rep. 146; R. v. Leyland, 3 Mau. and Selw.

184; R. v. Norwich, 1 Barn. and Adol. 810). It also issues to the judges of any inferior court (even the new county courts, 18 Law Tim. p. 98), commanding them to do justice according to the power of their office, whenever the same is delayed. In fact, the writ, when considered as a prerogative writ, issues from the Queen's Bench, where relief is sought in respect of the infringement of some public right or duty, and where no effectual relief can be obtained by an ordinary action at law (Reg. v. Hull and Selby Railway Co. 6 Qu. Ben. Rep. 70; 8 Steph. Com. 662, 2nd edit.). The writ of *mandamus* is obtained from the Queen's Bench on rules nisi, and absolute, founded on affidavits, though, under particular circumstances, a rule absolute is sometimes issued in the first instance. The writ of *mandamus* requires the party to whom it is directed either to do the thing required or to signify some reason to the contrary (except where a *peremptory mandamus* is issued in the first instance). This is done by what is called a return to the writ. If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment. If, on the other hand, he makes a return, and it be found either insufficient in law, or false in fact, there then issues in the second place a *peremptory mandamus* to do the thing absolutely, to which no other return will be admitted (R. v. Ledgard, 1 Qu. Ben. Rep. 616), but a certificate of perfect obedience and due execution of the writ (see 1 Abr. Crim. Law Cas. 20). In all cases of *mandamus*, the return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue, or demur; and the same proceedings may be had as if an action on the case had been brought for making a false return, and after judgment obtained for the prosecutor, he shall have a *peremptory writ of mandamus* to compel his admission or restitution, which latter, in case of an action, is effected by a writ of restitution (11 Coke's Rep. 79). In addition to which, it is provided by 6 & 7 Vic. c. 67, that the prosecutor objecting to the validity of the return, shall do so by way of demurrer to the same, in like manner as in personal actions, and thereupon the writ, return, and demurrer shall be entered on record, and the court shall adjudge either that the return is valid in law, or that it is not valid in law, or that the writ of *mandamus* itself is not valid in law; and if it adjudge that the writ is valid, but the return invalid, shall award a *peremptory mandamus*, and shall also, in any event, award costs to be paid to the successful party. The same statute also provides, that either party shall be at liberty, in every case where judgment is given against him upon a *mandamus*, whether after demurrer or otherwise, to prosecute a writ of error thereon, according to the

ordinary course of a writ of error in personal actions.

IX. Justices, actions, notice of.—The act of 11 & 12 Vic. c. 44, has given justices very ample protection for mistakes committed incautiously and not oppressively. By s. 1, for an act by a justice of peace within his jurisdiction the action shall be on the case, and it shall be alleged to have been done maliciously, and without probable cause, and be so proved. By s. 2, for an act done by him without jurisdiction, or exceeding his jurisdiction, an action may be maintained without such allegation; but not for an act done under a conviction or order, until after such conviction or order shall have been quashed; nor for an act done under a warrant to compel appearance, if a summons were previously served and not obeyed. By s. 4, no action shall be brought for issuing a distress warrant for poor's rate, by reason of any defect, or that the party is not rateable: nor shall an action be brought against justices for the manner in which they exercise a discretionary power. By s. 5, if a justice refuse to do an act, the Court of Queen's Bench may by rule order him to do it, and no action shall be brought against him for doing the act thereby required to be done. By s. 6, after conviction, or order confirmed on appeal, no action is to be brought for anything done under a warrant upon it. By s. 9, one calendar month's notice of action must be given to the justice.

X. Jurisdiction of Quarter sessions — Summary jurisdiction of justices.—Courts of general or quarter sessions have under the commission of the peace (for the jurisdiction is derived partly from such commission and partly from statutes), jurisdiction to try all felonies and all misdemeanors, except perjury, and forgery, at common law. This jurisdiction is much narrowed by the 5 & 6 Vic. c. 38, under which courts of quarter sessions are not to try any persons for treason, murder, or capital felony, or for any felony which, when committed by a person, not previously convicted of felony, is punishable by transportation for life, or for several offences enumerated in the act, and which are mentioned *ante*, 215. Besides the above jurisdiction courts of quarter sessions from particular statutes derive jurisdiction as to, appeals, coroners fees, county rates, gaols, diverting and stopping up highways (as to which see *infra* No. X.), lunatic asylums, vagrants, &c. The summary jurisdiction of magistrates extends over a vast variety of matters, the principle being matters connected with alehouses, apprentices, assaults, bastardy, betting-houses, bread and bakers, cruelty to animals, coal dealers, base coin, combinations, county rates, fire works, drunkenness, fisheries, friendly societies, game, gaming, hackney carriages

and cabs, hawkers and pedlars, nuisances, highways, horse-slaughtering, indecency, juvenile offenders, tenants, larceny, lodging houses, lunatics, malicious injuries, and trespasses (see *infra* No. XIV.), factory children, servants, wages, pawnbrokers, post-office, receiving stolen property, registers of births, &c., seamen, ships passengers, smuggling, stamps, sundries, sureties of the peace, tithes, vagrants, weights and measures, wrecks, &c.

XI. Stopping up, &c., paths.—A public footpath see (18 Jur. 1052) may be stopped by an order of justices enrolled at the sessions. This is under the 5 & 6 Will. c. 50 (the act to amend and consolidate the laws relating to highways), ss. 84, 85, and 91. By s. 84, the chairman of a vestry meeting, wishing to have any highway (which, by s. 5, includes a footway) stopped up, diverted, or turned, may, by an order in writing, direct the surveyor to apply to two justices (not stating that they shall be of the parish or even of the county) to view the same. By s. 85, when it shall appear upon such view of the two justices that any public highway [or footpath] may be diverted, &c. (the owner of the lands through which the proposed new way is to pass consenting), or if it shall appear upon such view that any public highway [or footway] is unnecessary (see *Rex v. Worcestershire*, 8 Barn. and Cres. 254, on the 55 Geo. 3, c. 68, now repealed), such justices may direct the surveyor to affix a notice in the form given in schedule No. 19 [which is that an application will be made at the quarter sessions for an order to divert or stop the highway or footway, &c.] at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up, and also to insert the same notice in one newspaper of the county for four successive weeks after such view, and to affix a like notice at the same time on the parish church door. On proof of the publication of such notices, and on the delivery to them of a verified plan of the old and proposed new highway, the justices may certify the fact of their having viewed the said highway [or footway], and (if merely a diversion is required) that the proposed new highway is nearer or more commodious to the public, and (if a stoppage is sought) the reason why the way is unnecessary. This certificate is to be lodged with the clerk of the peace to be read by him at the quarter sessions for the limit within which the highway to be diverted, turned, or stopped, shall be (*Reg v. Suffolk*, 6 Dowl. and Lound. 558), after four weeks from the lodging, after which the proceedings are to be enrolled among the records of the said court of quarter sessions. By s. 88, after such certificate is given, any person thinking himself aggrieved may appeal to the same quarter sessions, giving ten day's notice

thereof to the surveyor, with grounds of appeal. But by s. 91, if no appeal be made or succeed, the sessions may make an order to divert and turn and to stop up such highway [or footway] or to stop up such unnecessary way (see *Reg. v. Newmarket Railw. Co.* 19 Law Journ. N. S. M. C. 241; *Reg. v. Worcestershire*, 18 Jur. 428; S. C. 1 Law Chron. 17).

XII. *Repairs of highways and bridges.*—By the common law the liability to repair highways is on the parish in which they lay, or through which they pass; but this liability, by prescription, sometimes attaches to particular townships, and sometimes *ratione tenuræ*, to individuals (see 3 Steph. Com. 214, *et seq.*, 2nd edit.; 2 Abr. Crim. Law Cas. 84—88; 14 Jur. 170; First Book, 104; Dickinson's Quart. Sess. 373, 4th edit.). A surveyor of the highways is appointed to look after their repair, and a rate is levied on all property liable to the poor-rate for keeping the highways in repair (2 Abr. Crim. Law, 10, 11, 38). Turnpike roads are under the management and care of trustees or commissioners, who levy tolls to defray the expenses of repairing the same (First Book, 105). The expenses of maintaining bridges is defrayed by the counties at large, in which the bridges are situate (5 Barr. 2594; see 4 & 5 Vic. c. 49). And this is so as to bridges built by a private individual before 43 Geo. 3, c. 59, if the public use the same (14 Jur. 956; *McKinnon v. Penson*, 18 Jur. 513; S. C. 1 Law Chron. 60). And where the parish is bound by prescription (as is sometimes the case, 4 Barn. and Adol. 62) to repair a bridge, there is a statutory provision which gives effect to any contract between the county and the parish, for performing the repairs in future at the expense of the former, and relieving the latter from the charge. The liability of the county at common law extended not only to the bridge itself, but to so much of the road as passed over it, and even to so much as formed its ends or approaches. And by 22 Hen. 8, c. 5 (14 Jur. 956), the county was bound to repair three hundred feet, either way from the bridge. And this is still the state of the law as to all bridges built prior to 5 & 6 Will. 4, c. 50. But by section 1 of that act, it is provided that in the case of all bridges *thereafter* to be built, the repair of the road itself passing over or adjoining to a bridge, shall be done by the parish or other parties bound to the general repair of the highway, of which it is a part; the county still being, nevertheless, subject to its former burden as regards the walls, banks, or fences, of the raised causeways, and raised approaches to any bridge, or the land arches thereof (3 Steph. Com. 258; 13 Jur. 422; 1 Law Chron. 60. As to repair of bridges *ratione tenuræ*, see 2 Gale and Dav. 435).

XIII. *Forfeiture by conviction.*—In felony the offender forfeits (on conviction) all his chattel interests absolutely, and (on attainder) the subsequent (8 Bac. Abr. 738, 7th edit.) profits of all estates of freehold during life; and by attainder for murder the offender forfeits (First Book, 441) after his death, all his lands and tenements in fee simple (but not those in tail) which go to the crown, for a very short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's year, day, and waste. This year, day, and waste, are now usually compounded for, but otherwise (we are now speaking of murder only, see 4 Geo. 3, c. 145) they regularly belong to the crown; and, after their expiration, the land would naturally have descended to the heir (as in gavelkind tenure it still does) did not its feudal quality intercept such descent and give it by way of escheat to the lord. These forfeitures for felony arise only upon attainder (1 Mees. and Wels. 145); and therefore a *felon de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon. The forfeiture (in the case of murder) relates back to the time of the committal of the offence, but the mesne profits prior to attainder will not be affected (3 Bac. Abr. *suprà*), and as to chattels, the forfeiture relates to the conviction (4 Bl. Com. 386; 2 Inst. 37; 3 *Id.* 55; 4 Steph. Com. 483, 484, 2nd edit.; 2 Abr. Prest. *ostr.* p. 1; 6 Jur. Dig. 98).

XIV. *Wilful trespass, jurisdiction of justice.*—By s. 24 of 7 & 8 Geo. 4, c. 30 (11 Jur. 678), if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property for which no remedy or punishment is given by that act, every such person being convicted before a justice of the peace, shall forfeit and pay a reasonable compensation for the damage, injury, or spoil, so committed, not exceeding the sum of five pounds. This provision does not apply where the party acts under a fair and reasonable supposition that he has a right to do the act complained of; nor to any trespass, not being wilful or malicious, committed in hunting, fishing, or in pursuit of game (see *Reg. v. Dodson*, 9 Adol. and Ell. 704). By s. 28 of the same statute, any person found committing any offence against that act, whether the same be punishable on indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant or any person authorised by him, and taken before a justice of the peace (*Car. Cr. Law*, 227).

XV. *Settlements of paupers and removals.*—This question has been so fully answered before (see 1

Law Chron. 269, 448, and *ante*, p. 14), that we must refer the reader to the previous answers, as we have not space here.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

COMPOSITION DEED.—*Debtor and creditor*—*Accession*—*Limitation of time*—*Notice*.—There is no modern authority deciding that creditors cannot come in under a composition deed after the time fixed, though there are *dicta* to the effect. Property was assigned to trustees on the 22nd April, 1853, in trust for sale, the proceeds to be divided amongst the creditors of the assignor, with a proviso excluding such creditors as should not execute the deed before the 22nd July, 1853, or within such further time not exceeding thirty days as the trustees should declare. Notice of the deed and of this proviso was duly advertised. On the 22nd July, A. B. wrote to the trustees intimating his assent to the deed as attorney for C. D., a creditor to a large amount, then in America. On the 15th August, A. B. received a power of attorney from C. D. to execute the deed on his behalf. The trustees refused to allow the deed to be executed on the ground that the time limited for execution had expired: Held, that the execution ought to have been allowed, power having been reserved to the trustees to extend the time after the 22nd July, and it being their duty to give C. D. an opportunity of acceding to the deed. *Raworth v. Parker* Week Rep. 1855-6, p. 273.

COPYHOLD.—*Devise*—*Several tenements*—*Fees payable thereon*—*Recovering back excess*.—Four several copyhold tenements were devised to the same persons, and no custom was proved that the lord was entitled in such case to but one admission fine: Held, that four several admissions were payable thereon, and four several fines to the lord, but that it did not follow that the steward was entitled to four sets of fees thereon, and therefore, if there are no customary steward's fees in such case, the steward can only claim *quantum meruit*. The steward in the above case refused to admit, unless four admittance fines, four sets of steward's fees, and four stamps were paid down; but the devisee contended that the lord was entitled to but one admittance fine, and the steward to but one set of fees, and that one stamp only was necessary, and offered to pay *pro tanto*, which offer was declined, and the whole of the above amount claimed before the devisee could be admitted, whereupon the devisee paid the same under protest: Held, that the devisee was entitled to recover any excess that he might have been compelled to pay under the above

circumstances. *Treherne v. Gardner*, 26 Law Tim. Rep. p. 271.

FEME COVERT.—*Separate estate* [1 Law Chron. 200]—*Restraint on anticipation*—*Her receipts alone after income due to be discharges*.—No particular form of words is necessary to impose a restraint on anticipation, in a limitation to the separate use of a married woman, the question being one of intention. By an instrument giving property on trust for a married woman and her assigns for her life, for her separate use it was declared that the receipts of the married woman alone or of some person or persons authorised by her to receive any payment of the rents and income after such payment should have become due should alone be good discharges: Held, that she was restrained from anticipation. *Baker v. Bradley*, Week Rep. 1855-6, p. 78, 2 Jur. N. S. 98.

FEME COVERT.—*Separate estate* [vol. 1, p. 200]—*Restraint upon anticipation*—*Dealing with such estate by a married woman notwithstanding restraint clause*.—The purpose of a clause restraining anticipation on the creation of separate estate for the benefit of a married woman, is merely to protect the wife against the husband and the persuasions and influences which he might exercise over her, and it has not the effect of preventing her from settling an account in respect of that estate. The Court of Chancery will uphold an agreement entered into by a married woman, affecting her separate estate, although subject to a restraint against anticipation by her, where it sees that the agreement is one beneficial to all parties interested under the settlement, creating the separate estate. *Wilton v. Hill*, 26 Law Tim. Rep. p. 253.

JURISDICTION.—*Equitable defence*—*Suing at law for damages after decree for specific performance*.—*Damages awarded in equity for breach of contract*.—A. obtained a decree in a suit in equity against B. for the specific performance of an agreement, A. afterwards commenced an action at law against B. for damages occasioned by the breach of the agreement, B. pleaded the proceedings in equity as a defence on equitable grounds, under the C. L. P. A. 1854, s. 83. This plea was held bad at law. B. filed a bill in equity to restrain the action: Held, first, that A. was not entitled to proceed at law for damages by the breach of an agreement of which he had obtained the specific performance in equity: Held, secondly, that B. was not precluded by the decision against his plea at law from his remedy in equity to restrain the action: Held, thirdly, that courts of equity had jurisdiction to award damages for the breach of the agreement. A defence on equitable grounds, to be pleaded at law, must be a defence founded upon the principles which govern the decisions of courts of equity, not upon their forms of

practice *Prothero v. Phelps*, and *Phelps v. Prothero*, 26 Law Tim. Rep. p. 281.

JURISDICTION.—*Common law remedy—Equitable defence at common law—Concurrent jurisdiction.*—A defendant having pleaded an equitable defence under the Common Law Procedure Act, 17 & 18 Vic. c. 125, is not precluded from resorting to the Court of Chancery, although the Common Law Court has full jurisdiction, and his plea is a full bar to the action. *Evans v. Bremridge*, 2 Jur. N.S. 134.

MORTGAGE—*Foreclosure suit—Sale of estate mortgaged—Purchase-money, investment of—Loss on investment, by whom to be borne—Costs.*—In a foreclosure suit the mortgaged estate was, by the consent of all parties, sold, and the purchase-money invested in Consols, which were subsequently sold at a lower price, and the produce paid to the mortgagee. At the time of investment the purchase-money was sufficient to satisfy the debt, but the produce of the Consols was not sufficient. The mortgagee claimed to be entitled to the difference out of the assets in an administration suit: Held, that the mortgagee was still a creditor, and entitled to the balance of his principal, interest, and costs, including the costs of this application. *Tompsett v. Wickens—Bridger v. Wickens*, 1 Jur. N. S. p. 10.

PARENT AND CHILD.—*Undue influence and want of advice—Family arrangements.*—Transactions between parent and child may proceed upon arrangements between them for the settlement of property, or of their rights in property in which they are interested. Such an arrangement courts of equity look upon with favour; even ignorance of rights is not considered a fatal objection. On the other hand, such transactions may arise out of the bounty of a child towards his parent soon after attaining the age of twenty-one years, in which case the court looked upon the transaction with jealousy, and watched to guard the child from injustice. A son entitled in remainder to certain real estates expectant on the death of his father and mother, by whom he was maintained, soon after he came of age executed certain instruments whereby he made his estate in remainder liable for monies borrowed by his parents, and for which they had already mortgaged their life interests. It afterwards appeared that the mother was restrained from anticipation, and had no power to mortgage her life interest. The same solicitor acted for all parties: Held, on a bill by the son to set aside the deeds, that he was entitled to be relieved against them, except so far as they were securities for monies actually advanced to him, although the bill contained charges of fraud which were unfounded. *Baker v. Bradley*, Week. Rep. 1855-6, p. 78; 2 Jur. N. S. 98.

PATENT [vol. 1, pp. 126, 240, 312; ante, pp.

231, 282].—*Agreement to assign—Stipulation in—Practice of the court in decreeing specific performance.*—An agreement "that all patents taken out, or in the course of being taken out, or intended to be taken out, or that might at any time thereafter be taken out by any or either of them (the parties to the agreement), or on account of or for the benefit of any or either of them, in relation to the preparation and application of gutta percha," or "should any of the parties thereto thereafter invent or discover, or have communicated to him or them any invention or discovery relating to the use of gutta percha such patents and inventions should be for the common benefit, save and except the benefit of a certain patent for a particular application to other substances besides gutta percha," or any substances which might serve as a substitute for gutta percha, or which might be combined therewith, excepting always caoutchouc or such other substances as were already known and in general use: Held, that a patent for a machine "for coating wire or cord with and for giving shape or configuration to any plastic substance" was within its terms. If an agreement about a subject matter which is certain, is in intelligible language and the stipulations contained in the agreement are perfectly certain, this court will give effect to the agreement, although certain rights consequent upon those stipulations may have to be determined, which the court either cannot or is not asked to decide. If an invention is bound by the terms of an agreement the court will restrain the inventor from its contravention although the agreement may contain no stipulation binding the inventor not to use his invention except for the purpose of the agreement; and that too, notwithstanding the court cannot compel either of the parties to make the invention profitable to the other. Patents are property, which, when the subject of litigation, it is the duty of this court to deal with according to the rights of those who can show a right to them as such, whether they have several or common rights with respect to them. A discovery of the mixture of two or more simple substances, in certain definite proportion when collected into one substance for manufacturing or other purposes, and the discovery of machinery where such mixtures may be made, may be the foundation of two distinct patents. *Bewley v. Hancock*, 26 Law Tim. Rep. p. 264.

POWER.—*Power of appointment—Appointment by implication.*—It has been long settled as a clear rule, that where parents have a power to appoint a fund to children, and in default of appointment, or so far as an appointment may not extend, to the children equally, *prima facie*, if they appoint a

portion of the fund to one child, that does not exclude that child from sharing with the others any part of the fund which is left unappointed; and the mere circumstance that the portion left unappointed is such as would give to each of the other children a sum equal to what has been appointed is not material, though in all probability that would militate against the intention of the appointors. That was the rule established in *Wilson v. Piggott*, (2 Ves. jun. 351; 1 & 2 Sugd. Pow.) and acted upon by the Master of the Rolls in *Wombwell v. Harnott* (14 Beav. 143), which there is no doubt was correctly decided. Under a marriage settlement husband and wife had a power of appointing a fund among the children of the marriage; and in default of appointment, or so far as it did not extend, it was to go to the children equally. They had three children, and they, by deed, containing special clauses, appointed one third of the fund to one of them, and died:—Held, reversing the decision of Sir J. Stuart, V. C., that upon the construction of the particular terms of the deed of appointment, it must be taken, by necessary implication, to have been an appointment of the other two-thirds to the other two children, and that the appointee was not entitled to share in those two-thirds. *Foster v. Cautley*, 1 Jur. N. S. p. 25.

PRINCIPAL AND SURETY [1 Law Chron. 63, 89, 97, 242, 452, 453].—*Discharge of surety by non-execution of co-surety*.—A surety, who has contracted to become so on the understanding that he is only to be a co-surety with another, is released if the co-surety does not execute, and is entitled to have the instrument, which he has executed under the misapprehension, delivered up to be cancelled. *Evans v. Brewbridge*, 2 Jur. N. S. p. 134.

SETTLEMENT.—*Rectification of according to articles—Misrepresentation by parent of one of the persons about to be married as to fortune &c.* [1 Law Chron. 408].—Where a settlement, made before marriage purports to be made in pursuance of marriage articles, but is not in conformity therewith, the settlement will be corrected without further evidence. And although the ante-nuptial settlement does not state that it is made pursuant to articles, yet if it be clearly shown by evidence that it was intended to be in pursuance of the articles and that there has been a mistake, the court will rectify the settlement. Marriage articles stipulated that the settlement was to contain a covenant by the father of the intended wife that her fortune was not to be less than £10,000. The settlement, to which the lady's father was a party, contained a recital that the wife's fortune would amount to that sum, but did not contain any covenant by the

father to that effect. *Semble*, that the settlement did not operate as a covenant by the father, but the settlement was corrected by the articles. *Bold v. Hutchinson*, 2 Jur. N. S. 97; 26 Law Tim. Rep. 229; 1 Law Chron. 408.

SETTLEMENT.—*Voluntary settlement* [1 Chron. pp. 167—170, 804].—*Subsequent debts*.—In the following case the question arose before V. C. Kindersley, whether a creditor whose debt had accrued subsequently to the execution of a voluntary deed of settlement, could institute a suit to have that settlement set aside under the stat. 13 Eliz. c. 5. His Honour observed that there was no clear authority upon the subject, but that there was no doubt that if a decree was obtained in a suit instituted by a prior creditor, the subsequent creditors could come in under that decree and then obtain an equity to have all the debts satisfied; and it did not appear that in such a case there was any distinction between the two classes of creditors, or that any priority existed in favour of prior creditors; it appeared that they all participated *pro rata*. It was clear, therefore, that a subsequent creditor had an equity, and *prima facie*, therefore, it would be expected that there could be no rule to prevent him from enforcing that equity by a bill in Chancery. His Honour observed that if at the time of the filing of a bill by a subsequent creditor, one debt incurred at the time of the settlement remained due it might be the rule that the court could not say there was an intention to delay creditors; but if a subsequent creditor does file a bill and it is shewn that the person executing the deed was largely indebted though he has since paid off every debt he then owed, it would be very difficult to make out that it was an instrument to defraud or delay creditors because he had shewn that he had at the time expectations enough to justify him in making a voluntary settlement. It would be difficult, therefore, to establish a case of fraudulent intent. It appeared to his Honour in the absence of any authority, that at all events a subsequent creditor could file a bill if any debt which was due at the time of the execution of the voluntary settlement still remained due—accordingly, where it appeared that a settlor, by a voluntary settlement, assigned to trustees certain policies of insurance in trust for his wife and children, reserving a power of revocation, and at his death he was in insolvent circumstances, and he appeared to have owed at the date of the settlement large debts some of which were still due; a bill being filed by persons who became creditors subsequently to the date of the settlement, it was Held, that the bill could be maintained: and an inquiry was directed as to the solvency of the settlor at the time of his death. *Jenlyn v.*

Vaughan, 2 Jur. N. S. 109; 26 Law Tim. Rep. 268.

TENANT FOR LIFE.—*Difference between paying off incumbrances and bond debts—Statutes of limitations and of fraudulent devises.*—When a tenant for life pays off an incumbrance, he so makes himself purchaser of part of the inheritance; but when he pays off a *bond* debt, even if the debt be assigned, he is only in the same position as any other *bond* creditor. *F. M.*, a tenant for life, paid off several bond debts of his deviser without taking any precaution to keep them alive against the inheritance (from the evidence it appeared that he did not so intend). Many years after, at his instance, a suit was instituted for the benefit of the bond creditors of the deviser, and *F. M.* claimed to come in as a creditor for the amount of the bonds so paid off by him, the owner of the inheritance pleaded the Statute of Limitation as to the bond debts paid off by *F. M.*, but other defendants—annuitants under the will of the testator—did not. *F. M.* died in August 1854, before the cause came on for hearing, having sworn an affidavit in the June preceding, but which was not filed until the next February: Held, where an incumbrance is paid off by a person having an interest less than the whole inheritance—unless there is something to show a contrary intention—the presumption is that he meant to keep it alive for his own interest; but the intention will be defeated where he has allowed such a lapse of time, as that the bond creditor, if suing for himself, would have no right against the estate: *Semle* the owner of the inheritance, having pleaded the Statute of Limitation, it is to be taken as pleaded for all the other defendants. Under the statute of Fraudulent Devises the proper course for creditors is to sue the heir, making the devisee a co-defendant. *Morley v. Morley*, Week. Rep. 1855-6, p. 75.

TRUSTEES.—*Breach of trust* [vol. 1, pp. 11, 341, 308, 413]—*Repayment after death of one trustee and relending by survivor—Estate of deceased trustee held liable.*—The cases of *Clough v. Bond* (3 Myl. and Cr. 490), and *Bacon v. Clark* (3 *Id.* 294), decide that trustees who have a duty to perform do not discharge themselves by acts not strictly in accordance with their duty, and in those cases the trustees had not previously committed a breach of trust. Where trustees commit a breach of trust by an improper sale of trust funds, they are not discharged from the consequence of that breach of trust by replacing the fund in some stock, not the stock the sale of which constituted the breach of trust. They are not discharged by constituting something different from the original investment. Two trustees of a settlement lend part of the trust money to *A. B.* tenant for life under the settlement,

upon improper security—one of the trustees died, and his representative admitted assets. *A. B.* repaid the money advanced to him to the surviving trustee who immediately lent him part of the trust funds without any security. *A. B.* and the surviving trustee became insolvent: Held, on a bill filed by the children of the marriage to make good the breach of trust, that the estate of the deceased trustee was liable. *Lander v. Weston*, 26 Law Tim. Rep. p. 254.

WINDING UP ACTS.—*Joint stock company—Partnership within the statute—Assignment for benefit of creditors not constituting a partnership.*—Though persons who are partners between themselves are necessarily partners as respects the public, yet persons may be partners towards the world without being partners between themselves. Persons advancing monies to a partnership to be repaid out of the profits are not necessarily partners. If, indeed, they are to be paid by an annuity varying in proportion to the amount of the profits, they are then partners, for they get a share of the profits and their interests are affected by the fluctuations of the profits. In other words the fact that a loan so to be paid out of the profits does not make the lenders partners, unless they take a proportionate rate of the profits as such. So where there is an assignment for the benefit of creditors upon trust to carry on a business, and after paying the expenses to divide the gains among the creditors, the latter are not constituted partners. This will explain the following decision: *A.* and *B.*, carrying on business as iron-masters, having become embarrassed, entered into a deed of arrangement with their creditors, by which they assigned all their property and effects unto five trustees, upon trust, that they should carry on the business under the name of the *Stanton Iron Company*, with all necessary powers for that purpose, and should pay all expenses and interest on mortgages on the partnership property out of the gross income, and then divide the clear residue amongst the creditors, parties thereto, rateably according to the amount of their debts. Meetings of the creditors, parties thereto, were to be held from time to time, and a majority in number and value of the creditors, were to have power to order the business to be discontinued and that the business was then to be wound up, and it was provided that in case and as soon as all the debts of creditors, parties to the deed of arrangement, should be fully paid, then the trustees should hold any part of the trust property undisposed of, on trust for *A.* and *B.*: Held, that this was not a company or partnership within the Winding up Acts. *Re The Joint Stock Companies Winding up Acts 1848 and 1849, and The Stanton Iron Company* 26 Law Tim. Rep. p. 282.

MOOT POINTS.

No. 65.—*Executor renouncing—Devolution of executorship.*

A. by his will appoints B. and C. his executors. A. dies leaving B. and C. him surviving. B. proves the will and C. renounces probate and disclaims by deed. B. afterwards dies and by his will appoints D. his wife executrix. A. was seized as mortgagee in fee. The mortgagors subsequently to the death of B. sold the property with the concurrence of D. the executrix of B. The purchaser's solicitor took an objection to the title on the point that, inasmuch as C., the renouncing executor, survived the acting executor, B., the chain of executorship, so far as the latter is concerned, is broken, and that consequently the executrix of B. is not the executor of A., and that C. was the only proper party to join in the conveyance to release the premises and to give the discharge for the mortgage debt.

Under these circumstances, who is the proper party to give a receipt for the mortgage money?

W. M.

No. 66.—*Devise—Construction.*

Testator gave all his stocks and crops, furniture, interest, income, and profits being upon and arising from his estates and business unto his wife, A., for life; and then gave certain lands and premises described in the will, and known as Blackacre and Whiteacre to his son B., and his heirs; subject, nevertheless, that all the stock, produce, income, and profit arising from all and every part of the aforesaid premises, should be for the use and benefit of his said wife A., for and during her natural life. Does the widow under this devise take any, and if any what estate in the testator's real property?

FREDERICK SMITH.

No. 67.—*Devise—Dying before receiving share.*

A testator devised the interest of a sum of money to his wife for her life, after her death to all such of his children as should attain twenty-one years, but if any children should die before they should have received their share leaving issue, the issue to take equally the parents share so dying. The testator's wife died in September, 1846, leaving a daughter married, who had attained twenty-one years. The daughter died six months after her mother, without having received her share, leaving one child alive. To whom does the share belong; to the husband or the child?

W. S.

No. 68.—*Recovery Deed—Legal Estate.*

By a recovery deed, 1796, A. and wife were vendors and vouchees, B. tenant to the præcipe, C. demandant, and D. purchaser. A. and wife

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conveyed to B. to hold to B., his heirs and assigns, to the use of B., his heirs and assigns for ever, to the end, &c., that B. should become tenant, &c., and which recovery, which was duly suffered, was to enure to the use and behoof of D., the purchaser.

Qy. Is the whole legal and equitable fee in D.? If so, please explain the doctrine held in the case of Doe v. Passingham (6 Barn. and Cres. 305).

J. J.

No. 68.—*Trustees of Dissenting Chapels*

What acts of Parliament regulate the proceedings of trustees and officers of dissenting chapels, and can a majority of trustees, if inclined, sell chapel premises, and what is necessary to such a sale?

G. H. Clough (Workshop).

DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' SOCIETY.

Moot Point, No. 194.—Can a creditor who has registered a judgment under 1 & 2 Vic. c. 110, obtain a decree for foreclosure?

The negative of the moot point was held by the late V. C. Parker in the case of Footner v. Sturgess (5 De Gex and S. 736; S. C. Law J. R. 21; Ch. 741), on the ground that the judgment operated as a charge upon the land, the proper remedy for which was an order for sale; but as the statute, after directing that the judgment should operate as a charge upon all the lands of the debtor, proceeds to give to the creditor the same remedies in a court of equity as he would have been entitled to in case the debtor had by writing under his hands charged the lands with the amount of the judgment debt and interest, and as such a writing would be treated by a court of equity as an incomplete or rather as a contract for a mortgage, and which contract, according to the rules of such court, would give to the party claiming the benefit thereof all such rights as he would be entitled to if the same had been completed (Parker v. Horsefield, 2 M. & K. 420),—one of which is undoubtedly a decree for foreclosure—it seems that the affirmative of the moot point is correct, and that the decision in Footner v. Sturgis cannot be supported. The affirmative of the moot point was held in the cases of Ford v. Wastell, 2 Phillips, 591; Jones v. Bailey, 17 Beav. 582; and Price v. Bury, 23 Law J. R. Ch. 676, the latter case having, on appeal from the decision of V. C. Kindersley, been confirmed by the full court of appeal. It should be mentioned that the 15 & 16 Vic. c. 86, s. 48, now enables a court of equity in all foreclosure suits to direct a sale of the property. The meeting decided in the affirmative.

Moot Point, No. 195.—Is a corporation liable on a contract not under seal, such contract being incidental to the business or the purposes for which the corporation was established, though not of ordinary occurrence?

The common law exception to the rule that a corporation cannot contract except under their common seal, applies in cases where, to hold the rule applicable, would defeat the purposes for which it was established, the principle of the exception being convenience, almost amounting to necessity. The Court of Queen's Bench have in late cases extended the exception to all cases of contracts by trading or other corporations within the moot point (see *Copper Mines Company v. Fox*, 20 Law J. R., Q. B. 174; *Clarke v. Cuckfield Union*, 21 Law J. R., Q. B. 349; and *Henderson v. Australian Steam Navigation Company*, 24 Law J. R., Q. B. 322), while on the other hand the Courts of Exchequer and C. P. have maintained the common law exception in its integrity, refusing relief on all contracts not falling strictly within it (*East London Water Works Company v. Bailey*, 5 Law J. R., C. P. 175; *Samprill v. Billerica Union*, 18 Law J. R., Ex. 282; *Diggle v. Blackwall Railway Company*, 19 Law J. R., Ex. 808; *Homersham v. Wolverhampton Water Works Company*, 20 Law J. R., Ex. 193; and *Smart v. West Ham Union*, 24 Law J. R., Ex. 201). The meeting decided in the negative.

Moot Point, No. 197.—A creditor holding a guarantee joined with other creditors in accepting and signing a composition deed, on an agreement of which the other creditors were ignorant, that the guarantee should remain in force. Is such agreement valid?

A secret agreement by a creditor who joins with others in accepting a composition deed for any new security to himself for the residue of his debt, whether from the debtor or any third person, being void as a fraud upon the other creditors (*Cockshott v. Bennett*, 2 Durn. and East, 763; *Knight v. Hunt*, Law J. R. 1829, C. P. 165), and as the guarantee mentioned in the moot point would become void by the acceptance of the composition, the agreement of the surety to continue liable, it was thought amounted to a new security to the creditor, and as such fell within the general rule.

The point was raised but not decided in *Lewis v. Jones* (4 B. and C. 506; and see also the case of *Davidson v. Mc Gregor*, 11 Law J. R., Ex. 164; and the reporter's note thereto). The meeting decided in the negative.

THOS. HORTON, *Hon. Sec.*

COUNTY COURTS AMENDMENT BILL.

THE new bill of the Lord Chancellor respecting the county courts has some important provisions. Actions for malicious prosecutions may be brought in such courts, and in all cases, except *crim. con.*, power is given to the courts, by consent, to try causes, although the matters be beyond its jurisdiction. The metropolitan districts are, for the purposes of issuing and serving summonses, to be considered as one district. In other districts, the difficulties that have arisen from the existing requirements, that the action must be brought in the district where the cause of action arose, are removed by a provision that the summons may issue in any district in which the defendant shall dwell, or carry on business, or have employment at the time of the action brought; or, by leave of any judge, a summons may issue in the district in which the cause of action arose, or in which the defendant shall have dwelt, or carried on business, or had employment at some time within six months next before the time of action brought; and in all cases the decision of the judge at the trial, as to where the cause of action arose, &c., is to be final. Where the claim is reduced by a set-off to £50, the court is to have jurisdiction, provided neither the claim, counter-claim, or set-off amounts to £200. Where title incidentally comes into question the judge may, with the consent of the parties, decide the claim which is the immediate object of the action; but the judgment is not to be evidence of title between the parties or their heirs in any other proceeding in that or any other court. Where more than £20 is claimed in contract, or more than £5 in tort, the defendant, on giving notice of objection and security for costs, may stay proceedings, and if within ten days plaintiff does not commence an action for the same debt or demand in the superior court, the judge may order the security to be cancelled, and plaintiff his costs. In any action of contract brought in a superior court for a sum not exceeding £50, a judge may, on the application of either party, direct that the cause shall be tried in a county court. Judgment is to go by default in cases exceeding £20, where defendant does not give notice of intention to defend. There are other provisions as to the parties serving their own summonses and witnesses, and as to the fees of counsel and attorneys, &c.

LIST OF CORRESPONDENTS.

The following is the only name to be added to the lists at pp. x, 96, xx, 168, xxviii, xxxii, xxxvi, viz., Mr. John Jones, Newcastle-Emlyn.

CONDITIONS OF SALE OF REAL ESTATE.

WE have before had occasion to call attention to the subject of conditions of sale, and we conceive that it is such a matter as must always be of interest to the profession, inasmuch as solicitors have almost daily, either for vendors or purchasers, to prepare or advise on their effect. It is admitted on all hands, that the system of framing conditions with a view to save trouble and expense to vendors is now grown to such proportions that if possible some remedy should be adopted, but the difficulty is how to reform the practice without injury to the interests of vendors. There are some persons, however, who contend that no injury is done to a purchaser by even the most stringent conditions, because on a resale the purchaser may insert similar if not more stringent conditions: the first purchaser may be supposed to give less on account of the stringent conditions (for which loss the then vendor is compensated by getting rid of the estate with a defective title or by saving the expense of necessary evidence to substantiate his title), and he in his turn when he comes to sell will have to submit to a similar reduced amount of purchase money. There is no doubt something in this, if it be supposed that no radically bad title is ever forced on a purchaser by such conditions, and though rare, there certainly are titles upon which eviction does, and many more upon which it *might* follow, if the parties entitled became aware of their rights.

The subject is one peculiarly within the province of solicitors, for though counsel are occasionally called on to settle conditions of sale, in the majority of cases solicitors frame their own conditions of sale. We therefore avail ourselves of a paper read by Mr. Caparn, of Holbeach, at the meeting of the Provincial Law Society held at Birmingham. Mr. Caparn after some preliminary observations said:—
 “That conditions of sale are still very frequently unfair to the purchaser, who cannot possibly know the state of the vendor's title, and the expense which he (the purchaser) may have to incur if he buys, and stretched beyond their legitimate province, I believe will not be doubted; but, lest this should be so, I will give an instance or two which have come before my notice within the last two or three years.

“On one sale of upwards of 60 lots, held under a great variety of titles, the following were a part of the conditions:—

“All official and attested or other copies of, and extracts from, any Act of Parliament, award, will, admission, deed, document, or proceedings, whether upon record or otherwise, and all letters of administration, and all certificates of baptism, marriage,

burial, and other certificates or documents, and statutory declarations, copies of, or extracts from, parochial or other registers, and all evidence as to pedigree, heirship, births, marriages, deaths, or intestacy, or of identity, whether required for the purpose of verifying the abstract, or for any other purpose, and of any deeds of covenant for the production of the same, and all assignments or surrenders of any outstanding, and *yet unsatisfied*, term or terms, and *reconveyances of any legal or equitable estate or estates or interests shall be made, taken, and obtained by the vendor's solicitors, at the expense of the party requiring the same respectively.* And all expenses attending the examination or comparison of the abstracts with the title-deeds and other documents, wheresoever the said deeds or documents may be, and of journeys taken for that purpose, shall be borne and paid by the purchaser or purchasers of the lot or lots in respect of which such expenses shall be incurred.

“The vendor shall not be required to produce to any purchaser or purchasers, or his, her, or their solicitor, any deed or other document not in his custody or control, nor to furnish any covenant for the production of any deeds or other documents not in his custody, nor any abstract of any such deed or other document, notwithstanding the same may be mentioned, or referred to, or covenanted, to be produced in or by any deed or document now in his hands, nor shall he be obliged to point out where any such deed or document of title not in his possession is. And all abstracts, extracts, or copies produced by the vendor of deeds, awards, or other documents, not in his possession, shall be deemed and taken to be correct, and the production by the vendor of any deeds or other documents, or of any abstract of any deeds or other documents which he is not bound to produce, according to these conditions, shall not be deemed or taken as a waiver of any of these conditions.

“If any documents in the vendor's possession shall relate to property bought by several purchasers, and all the lots to which the same may relate shall be sold now or hereafter, then such documents, on the completion of the present or future sales of all the lots to which the same may relate, shall be delivered to the purchaser paying the greatest amount of purchase-money, upon his entering into covenants, at the costs and charges of any owner or purchaser of property to which the same may relate, at the expense of such owner or purchaser for production of such documents, and delivering copies or extracts thereof. Should any difficulty arise as to such largest purchaser, the decision thereon of the vendor shall be final. In case and

whilst any lot remain unsold, the documents to which the same may relate shall remain with the vendor; but he shall, at the expense of any purchaser, enter into covenants for production of the same, and for furnishing copies or extracts thereof, but determinable thereafter on delivery thereof to any purchaser or owner of property to which the same may relate, on procuring from him, on request, a similar covenant. Whilst any documents remain in the vendor's possession he will, at the request, costs, and charges of any purchaser, produce, and also furnish, copies and extracts of the same. The delay of delivering or procuring covenants for title, consistently with these conditions, shall not retard the completion of any contract, but every purchaser shall, in such case, be satisfied with the engagement by this condition, that the vendor will hereafter, at such purchaser's expense, procure for him a covenant for production, if required, when he may be entitled thereto, and, in the meantime, that the vendor will, upon the request, and at the costs and charges of such purchaser, produce and furnish copies and extracts of the documents retained.

"The vendor shall not be required to furnish any evidence of the identity of any lot or lots, with the description in any of the deeds or documents of title, or in any schedule thereto, or to reconcile the difference in any such descriptions, whether in abutments, admeasurement, or otherwise, other than by some statutory declaration of any respectable person who has been acquainted with the property for twenty years, that the reputed, or apparent possession, or enjoyment, has during that period been consistent with the title shown by the abstract, so far as is shown, nor with respect to any lot or lots shall the vendor be required to distinguish freehold from copyhold."

"Now it will be evident what heavy costs, properly and fairly chargeable on the vendor, the first of these conditions seeks to throw upon the purchaser, and the extent of which, at the time of sale, the purchaser has no possible means of gaining the slightest idea of, while the vendor's solicitor either is, or ought to be, fully aware of them. Then here, also, is the stipulation which ought to be most strenuously decried, that documents shall be prepared for, and at the expense of, the purchaser by the vendor's solicitor, thus holding out an inducement to parties to become the clients of the vendor's solicitor, under the penalty of increased expense by their own solicitor perusing and approving the documents on their behalf. See, also, in the next of these conditions, the extreme unfairness of providing that the vendor shall not produce, nor furnish covenants to produce, nor abstracts of any

deed or document not in his custody, nor even be obliged to point out where any such deed or document is—amounting, in fact, to the stipulation that the title, as set forth in the abstract of deeds or documents said not to be in the vendor's possession, shall be taken as correct, unless after a search in the dark the purchasers should happen to find documents contradicting such title, or, in other words, that the abstracts, imperfect, it may be, shall constitute not the index to, as it merely is, but the title itself.

"The next condition is, perhaps, of less importance, but still it is surely too much to expect that a purchaser, requiring a covenant to produce the muniments of his title, should be satisfied to complete his purchase, and have only the guarantee of a condition of sale for their production until the vendor may think fit to procure a covenant.

"Surely, also, seeing the difference in value between freehold and copyhold estates, amounting, in cases of copyhold of manors with arbitrary fines, to fully one-fifth, the condition that the vendor shall not distinguish freehold from copyhold is one far from fair and reasonable. * * *

"With all deference, I would suggest that the first step hereto will be carefully to consider what is the proper and legitimate object of conditions of sale of real estate, contradistinguished as they are from the conditions of sale of mere movables, and I am aware that here a large field is open for discussion. Still I believe that certain well-defined principles may be laid down within which conditions considered fair and reasonable by this society may be circumscribed, and beyond which very special and intelligible reasons ought to be assigned for passing.

"It will at once, perhaps, be said, What are these principles? If you see them, define them. This, perhaps, is more than I can do; but, impelled by the belief that there is here a great disease in our professional constitution, and that an effort of energy, perhaps, rather than mental ability, is needed to apply a remedy, I will venture, at least, to provoke discussion upon it by submitting, with all deference, my own views upon the subject.

"The conditions, then, upon which—putting myself in the position of a vendor's solicitor—I should deem it fair and right, as well having regard to the interest of my own client, whose sale might be injured, if not prevented by extraordinary stringent conditions, as to the principle of honourable dealing between the vendor, who knows the state of his evidence of title with its defects (if any), of greater or less importance, and the possible purchaser, who must necessarily be, in a very great measure, if not altogether, ignorant upon the subject, I should deem it my duty, in the first place, to provide for

fair, un retractable bidding (if by auction), and a plain binding contract for the sale and purchase of the estate, as if the title were marketable and perfect, providing for the various steps towards completion to be taken within reasonably limited periods by the contracting parties, subject to the usual penalties of the nullity of the step taken, or other penalty, in case of not being taken in due time, and for the fair, or, it may be, penal payment of compensation, in the shape of interest, by the purchaser, if the completion were delayed. To these I would add a provision, now ordinary, though extra the requirement of the law of simple contract, that facts, &c., evidenced by recitals in deeds, &c., acted upon and dated twenty years ago, should be deemed sufficient, unless disproved; and a provision that any unwitting mistake in description quantity, &c., should not invalidate the sale, but be matter of compensation by arbitration.

"With these conditions, as between the vendor with a marketable title and a purchaser, I should think it my duty to be satisfied. Then comes the question of special circumstances, and the special conditions to meet them, and upon consideration whereof principle is too often sacrificed to a short-sighted imagination of expediency, and attempts are made, and too often succeed, to the dissatisfaction of all parties—the injury especially of purchasers, and the opprobrium of the profession—not only to dispose of the estate with an unmarketable and imperfect title, but to cast nearly the whole of the cost of patching and purging the holes and blots in the title that is shown, upon the unwary purchaser, who is, of course, in a very much worse position to do so than the vendor.

"Many special conditions are, of course, under special circumstances, admissible without demur, and, indeed, so commonly adopted as scarcely to be called special; such are the conditions, as to covenants for title, in case of a division of an estate, and against covenants for title, from bare trustees for sale, or mortgagees, and to these may frequently be added a condition limiting the commencement of the title, especially where the earlier title is one well known in the neighbourhood, and a saving of expense to both parties is the only real result of the limitation.

"Having thus endeavoured to sketch a short outline of simple and special, but admissible conditions of sale, and the principle that should guide in the settlement of them; having also given a few examples of such as I deem unfair and injurious alike to the vendor—whose sale flags from the fears of would-be purchasers—to the purchaser—who knows not the expense and cost he is incurring to secure a desirable estate, yet which, like gold, may be bought too dear—

and to the profession—which incurs the censure of both vendor and purchaser for their disappointment—I would, in conclusion, suggest that a committee of this society be forthwith formed, who should request solicitors from all parts of the country to forward to them the conditions of sale, both general and special, commonly used in their respective districts, with any remarks they may think fit to make on the subject, and who should, after mature consideration, recommend common and extraordinary conditions of sale for adoption, and enunciate a principle, so far as past experience will warrant and enable them, for guidance in preparing special conditions to meet special cases; and, above all, speaking plainly the opinion of this society upon the condition that the vendor's solicitor shall prepare deeds for and at the expense of the purchaser.

THE LATE LORD TRURO.

(Continued from p. 293)

In all the most important respects his judicial character stands deservedly high, and fully sustains his former reputation. The greatest of all virtues in a judge he possessed in a remarkable degree; he was wholly bent on the pursuit of truth and justice, and to this he sacrificed all other considerations: hence his pains were indefatigable, and his patience inexhaustable. He gave his mind entirely to the matter before him, without suffering any other that came across to divert him for an instant. His knowledge and his experience, no one ever doubted, would be shown to guide his course; nor did any one who had observed the purity of his professional conduct, question the perfect impartiality of his demeanour as a judge. To say that he was free from all partiality towards suitors would be small praise; happily the times have long gone by when this could be given as a distinguishing mark of any judge's conduct in England. But another kind of partiality has too often been known amongst us; judges have had possibly favourites at the bar,—certainly have been under the influence of eminent barristers; and this has exactly the same evil consequences with preferences among suitors: it works positive injustice to the parties whom these advocates represent. If one can obtain the indulgence denied to another, in urging an objection at first deemed frivolous, or can be suffered to commit an irregularity which only in him would be allowed, there is a want of perfect justice towards the parties represented by their counsel, and there is also an unjust preference given among the members of the profession. Nor should it be forgotten that this kind of unfairness is the more dangerous, because it is practised without any of the disgrace attending the

more flagrant violations of justice; and because the bias is apt to arise gradually in a judge's mind, often before he is aware of it. The necessity is thus apparent of all in judicial situations being watchful to guard themselves against falling into this error. It may safely be affirmed that no one ever had less of it than Lord Truro, whether in the Court of Common Pleas, or afterwards in Chancery and the House of Lords. Among the counsel practising before him he knew no difference whatever; all were precisely the same in his eyes; and no one could hope for the slightest favour, even such as might be supposed due to long standing, great experience, extent of practice, or eminent talents. All were put precisely on the same footing before him, except that perhaps to avoid anything like a bias, and guard himself from the least deference towards one rather than another, he might lean against men of great weight and authority in the profession, especially if they appeared to presume on it.

When the Great Seal was offered to him, even pressed upon him, in 1850, he accepted it with great reluctance; but they who knew him well had no doubt whatever that the apprehension on which his dislike of the charge rested was groundless; for they felt satisfied that, with his perfectly legal understanding, his familiarity with practice in other courts, and his indefatigable industry, he would find no difficulty in performing the duties of his new station, for which, indeed, his former habits as a solicitor might be said in some sort to have prepared him. The event fully justified these expectations. He gave great satisfaction in the Court of Chancery by the extraordinary diligence with which he sifted every case that came before him, his unwearied patience in hearing counsel, but with his attention ever awake, and the unaffected anxiety which he showed to master such points of practice as he was necessarily little familiar with. The only fault ever laid to his charge either there or in the House of Lords, was an over-anxious or too elaborate dwelling upon all the points in each argument, without due regard to their relative importance, which was only a good quality carried to excess, and has already been mentioned as the defect of his advocacy. His judgments in both these courts never failed to give entire satisfaction, though occasionally attended with delay. It must further be remembered that of the Chancellors taken from the common law bar, with the exception of Lord Erskine, his tenure of office had been by very much the shortest. Deducting vacations and Christmas recess, he was only twelve months in court; Lord Lyndhurst, in his first period, making the same deductions, twenty-four months; Lord Brougham thirty. In the House of Lords he

had to consider cases involving the principle as well as the practice of a foreign law, with which he was of necessity wholly unacquainted; and the scrupulous care which he took to examine each subject, the diligence and the success with which he made himself master of that system of jurisprudence, were as much the theme of admiration among the practitioners as the unexampled patience with which he listened to the arguments, and the unrelaxed attention with which he ever kept his mind on the stretch during every part of the cause. Some of his judgments are worthy of deep study by all who would thoroughly understand the legal questions involved. That upon the Scotch poor law, delivered soon after he quitted the Great Seal, in 1852, is especially deserving, not only to be praised, but studied; as also most eminently does his judgment in the Braintree church rates case.

Having held up the professional career of this distinguished lawyer to the diligent contemplation as well of students as practitioners, we are bound, as friends of law amendment, to express our regret that he cannot be considered as a model for our brethren in this great cause. But this is the subject only of regret, not of blame; and it is remarkable how much of what we have to lament arose from that which was the source of his professional defects, as we have described them, his excessive attention to minute particulars; his over-anxiety about each point; for this it was that gave him so strong a feeling in favour of those technical niceties on which he had so often distinguished himself at the bar,—the fields, as it were, of the victories he had there gained. He thus had an almost invincible prejudice against any sweeping changes of the law; and a better illustration of this and of its origin, as we have just described it, cannot be given than by referring to his dislike, indeed his resistance, as far as he could resist, the late most beneficial alterations in the law of evidence. He had long been accustomed to the distinction taken between interest in the question and interest in the event, as an objection to the competence of a witness; he had scores of times taken the point, and luxuriated in all the niceties connected with it. He regarded the rule in *Bent v. Baker*, as he did the rule in *Shelley's Case*, a principle settled on an immoveable foundation, and extending its influence directly, or by analogy, far and wide in the law of evidence. To Lord Denman's Act, sweeping away the whole of this "excellent and curious kind of learning" (as Lord Coke calls that of estoppel), he had an invincible repugnance; he regarded it as removing landmarks. That all objections to the competency of a witness, even his conviction of felony or of perjury, and all objections of interest in the matter, whether the question or the event of the

suit should be at an end, and left only to their weight with the court and jury, seemed to him a stretch of the reforming power hardly to be credited, nor at all to be endured. Happily he was one of only a very limited number, either in the profession or in Parliament, who held these opinions,—perhaps we should rather say, were influenced by these feelings,—and the bill, delayed for a session, passed unopposed the next. When, two years after (1845), Lord Brougham's Bill, to make the parties competent witnesses in civil cases, was first brought in, it did not reach the Commons, having been postponed on account of the Outstanding Terms Bill and others, to which the attention of our readers and of the Law Amendment Society was directed at the time. Long before it had passed the Lords, Mr. Serjeant Wilde had ceased to belong to the Lower House; his opposition to it, therefore, came from the Woolsack. He opposed it in all its stages, and argued at great length against its principle in the select committee to which it was referred. As his whole reasoning applied just as much to Lord Denman's Act, which had been the law of the land for above six years, he was asked if he intended to move its repeal; and he frankly confessed that he wished he had any chance of success in such an attempt. The judges had taken, not perhaps so strong a view of the question, but a decided objection to the new measure, and had communicated their views to Lord Lyndhurst, who attended the committee, but gave the bill no opposition. In the House, on the third reading, Lord Truro had hopes of his support; but he would not even stop to hear the renewed discussion; and the Chancellor was fain to let it pass without further resistance.

His objections to the immense improvements in the Bankrupt Law, effected at the close of the session 1831, had exactly the same origin with those against the new law of evidence. For well nigh half a century, at the bar, as a solicitor, in his clerkship, he had been accustomed to the scheme of the *Septuagint* (as the very worst tribunal that ever existed in a civilised country was sometimes termed), and he could ill bear its being swept away. He therefore expressed a strong opinion against the new system, though surrounded by colleagues, who had in 1831 made its adoption the ground of congratulation to Parliament in a speech from the throne, when the failure of the Reform Bill was lamented. His opposition to the Registration Bill falls within the same description. It was the measure of the Government, though brought in on their part by the Lord Chief Justice, as having been head of the commission in 1828, upon whose report it was grounded. But the Chancellor resisted it strenuously, and summoned an eminent conveyancer to make an

elaborate speech against it, in the form of evidence, before the select committee of the Lords. The bill passed notwithstanding, and, like most measures of law amendment of late years, was dropt in the Commons.

These and other instance of Lord Truro's dislike to changes in our jurisprudence, produced the general belief that he was an enemy to all amendment of the law; and men made themselves merry with describing the delight he took in the yearly "massacre of the innocents" at the end of the session, when all were fated to perish in the Commons that had escaped the hands of the "fell Serjeant" in the Lords. But it really was not so. The prejudices under which he laboured have been admitted and traced to their source; but he was at bottom of perfectly liberal opinions, and ready to give every plan that was propounded a most fair and candid consideration. No more remarkable proof of this can be given than his conduct upon the great measures connected with the Courts of Equity. He originated the Court of Appeal in Chancery by the bill for appointing Lords Justices, which has enabled his successors effectually to prevent any arrears in that court without such exertions as had formerly become necessary, exertions which never could be made unless upon rare occasions. He had been at first averse to the great measure of Chancery Reform, the abolition of the Masters' office, and making the judges work out their own decrees. That he should have been slow to adopt so great a change in the whole system, need create little surprise, when we reflect on the many years that elapsed from its first proposal by Master Brougham in his report to Lord Lyndhurst and Lord Langdale as far back as 1812, until its final adoption in 1852. But slowly as Lord Truro came round to the views of the commissioners in 1851, he with his wonted candour gave the most hearty support to them, when he had, with his habitual industry, made himself completely master of the whole subject. Before he quitted office he had prepared the bills which were to give effect to that plan; as was fully stated by V. C. Page Wood in the Commons when Solicitor-General, some mis-statement having been made of the bills having originated with the succeeding Government, which had in fact only adopted the measures of their predecessors. To represent Lord Truro, therefore, as an enemy to all legal improvement is entirely contrary to the fact. The utmost that can be said is, that his course of proceeding while he held the Great Seal prevented the friends of law amendment from having as great confidence in him, and as great expectations from him, as their profound respect for his eminent qualities, and his unblemished purity in the exercise of his high office

made them most anxious to be justified in entertaining. They therefore looked forward to his resuming office in 1853 with somewhat of alarm; and there can be no doubt that his being left out of the arrangement between Lord Aberdeen's friends and the Whigs, was altogether owing to his differences with the liberal party in questions connected with Law Reform.

To himself personally this omission could unhappily be a matter of no importance. The state of his health must almost immediately have rendered him incapable of the labours of his office. It is melancholy to add that after a continued illness, and great suffering for many months, he closed his virtuous, industrious, and useful life, in the month of November 1855, and in the seventy-second year of his age,—having both towards the end of it, and at several other times, borne with patience and resignation such as few have ever shown, pain such as few have ever been called to undergo.

NOTICES OF NEW BOOKS.

GREENWOOD'S CONVEYANCING.

A Manual of the Practice of Conveyancing, showing the Present Practice relating to the Daily Routine of Conveyancing in Solicitors' Offices. To which are added Concise Common Forms and Precedents in Conveyancing; Conditions of Sale; Conveyances; and all other Assurances in Constant Use. By G. W. GREENWOOD. London: Stevens and Norton.

THE author states that his principal endeavour has been to produce such a book as may be of service to articled and other clerks in the profession, who may sometimes feel the want of a simple guide to enable them to perform such portions of the conveyancing business as may be intrusted to them. This very modest aim has certainly been fulfilled, and something beyond it, as we think the extracts we shall presently give from the work will satisfy our readers. In fact, we consider that it is a book calculated to be of material assistance in a solicitor's office, especially where the practitioner has not had much experience in conveyancing matters. Indeed, we think that a perusal of the work would be beneficial to the busy solicitor, as being calculated to remind him of matters which in the hurry of business are sometimes overlooked. The work consists of two parts, the first being Practical Directions in Conveyancing matters (from p. 1, to 126) arranged under the following heads: Agreements, Sales, Purchases, Mortgages, Copyholds, Leases, Settlements, Disentailing Deeds, and Deeds executed by Married Women, Wills. The 2nd part of the

work contains a variety of practical forms of Agreements and Conditions of Sale, Conveyances, Mortgages, Bonds, Settlements, Wills, Powers, Covenants, Assignments, Notices to Quit and of Dissolution of Partnership, Distringas on Stock and Conveyancing Costs and Charges.

From the Practical Directions we take the following extract from which the reader will see how Mr. Greenwood has performed his task:—

"MORTGAGES."

"In the case of a mortgage, should you be professionally concerned for the mortgagor, the observations I have written under the head of 'Vendors,' as far as regards the abstract and completion of the matter, will equally apply here; and if you are acting for the mortgagee, the course of proceeding will be similar to that of a purchase, with this difference, that a mortgagee is never under any conditions as to title or evidence of title, or as to the time in which the matter is to be completed; there is also this further difference, that a willing purchaser will often waive many points on the title, through a wish to get what he has purchased; he may want a few extra acres to make his lands lie in a ring fence, or a particular house, either for occupation or for removal, in order to improve a view; but in the case of a mortgage, none of these circumstances can arise; a mortgagee lends his money and expects to have it back again, and therefore if there is any doubt as to the title, or as to obtaining the evidence necessary to establish it, you should never advise your client to advance his money until such doubts are removed. If, however, the queries you find it necessary to raise on a title should not be of a serious nature, but merely a question of expense hereafter, in case a sale is resorted to, then you will ascertain how far the value of the property will be sufficient to pay for this extra expense; for if your client has a good title, and is amply covered by the value of the property mortgaged, he will be safe in making the advance. It is also important to see how far you can rely on the covenant of the mortgagor to repay the money, although this should not be taken into consideration, until you are satisfied as to the value of the security and the title to it. The covenant of a responsible man is at all times of some value, and if the mortgagor is of that class, you will be justified in abating some of the rigour that you would otherwise exercise.

"When I speak of the 'value' of property, I mean 'marketable value,' in other words, the amount likely to be realised by a forced sale. I have known property in mortgage, consisting of mills, manufactories, &c., of considerable value; but yet in times of commercial depression not marketable, and in such a case as this, however anxious the mortgagee may

be to realise his security he cannot do so, unless the mortgagor be a man of substance and can be reached under his covenant for repayment of the money. As there are various descriptions of mortgages, it may be of service if the principal are here stated, and a few remarks made on each. They are as follows: Mortgage of freehold land, which is the highest class of mortgage; mortgages of freehold houses; mortgages of copyhold land or houses; mortgages of leasehold houses; mortgages of freehold or leasehold mills; mortgages of manufactories &c.; mortgages of life interests; mortgages of reversion; mortgages of policies of assurance.

"With respect to the first, viz., mortgages of freehold land, and in this I may include freehold ground rents, your client will be quite safe in advancing to the extent of two-thirds of the value, as certified by a respectable surveyor, as experience proves that commercial depression exercises very little influence on landed property, unless it be to raise the price, many people at such times being more anxious to invest their money in something secure and tangible than at times when trade is buoyant.

"With respect to freehold houses, and indeed house property of any tenure, locality is the principal object; should the locality be a good one, and the tenant a responsible man and hold the property on lease, then freehold houses form a very good investment, although you should not advise much more than one-half the value of the property being advanced.

"Copyhold houses or land, where the fine on death or alienation is certain, that is nominal, form an investment of little less value than freehold; but in manors where the fine on admittance is an arbitrary one, that is at the will of the lord, then in estimating the value of the property the amount of the fine must be taken into consideration, as every person admitted must pay a fine, which in most manors is two years' improved annual value (it cannot be more than this), and consequently a purchaser would give so much less for the property.

"Leasehold houses, although daily taken as a security, are never looked upon with any great degree of favour, unless the locality more than counterbalances the evils of the tenure. In advising your client on a security of this nature, many things must be taken into consideration: 1st, the amount of ground rent reserved by the lease; then the nature of the covenants in the lease, some of which may be of an onerous nature, and may not have been duly performed; and, 3rdly, that, at a time of commercial depression, leasehold property, unless in a first-class neighbourhood, is very difficult to be got rid of.

"You may sometimes be called on to advise a client as to advancing money on leasehold ground rents, or, to speak more correctly, improved rents. These rents arise in this way. A person may hold a house under a lease, for, say ninety years, at a rental of £5 per annum, he may have granted an underlease of this house for the whole of his term, less a few days, at a rent of, say £45. Here the improved rental is £40 per annum. Now, in a case like this, precisely the same questions will arise for your consideration as to covenants, &c., as in the case of a leasehold house offered as security, but if you can satisfy yourself on these points, improved ground rents will form a better security than any other description of leasehold property.

"The next head 'Freehold or Leasehold Mills, Manufactories, &c.' will require your very serious consideration before advising your client to advance his money. I am aware that in manufacturing districts owners of this class of property do not find much difficulty in raising money upon it; but this chiefly arises from the fact of the lender having it constantly before his eyes, and also in many cases from the personal knowledge he has of the borrower. Should you be called upon to advise your client respecting a mortgage of this description, you will take into consideration the value of the buildings, steam boiler, machinery, gearing, &c., as valued by a competent person, and also the responsibility of the borrower; and should you find everything satisfactory, I should not recommend so much as one-half of the value being advanced, as in case of bankruptcy, the mortgagor being in possession, only such of the machinery, working gear, &c., as may be affixed to the freehold can be claimed by the mortgagee. It has recently been decided by Lord Cranworth, that in these cases the mortgagee can claim what may be known as 'trade fixtures,' and everything not comprised in that 'term' can be claimed by the assignees of the mortgagor. Now, in such a case as this, some difficulty would be found and some delay arise in disposing of the remainder. In all mortgages of this or any other description, where chattels form part of the property comprised in the mortgage, the security, or a copy of it (of course the latter in practice is always filed) must be filed pursuant to the "Bills of Sale Act," 17 & 18 Vic. c. 36, otherwise the mortgage as to such chattels would be void as against an execution creditor and the other persons mentioned in the act, but this filing the security or a copy of it does not give any greater security to the mortgagee, in the event of the mortgagor becoming bankrupt, than he had before the passing of the act.

"Trustees cannot, under any circumstances, even if the instrument under which they are empowered to advance money extends to this description of property (a very rare occurrence), be advised to advance trust money on it, as they are placed in a very different position to an ordinary lender, who will, sometimes, for the sake of obtaining a high rate of interest, be content to incur a little risk as to his security; but trustees ought only to look at the value and nature of the security, for whatever may be the amount of interest obtained, it will not be taken into consideration in case the security should prove insufficient in value, and a loss should accrue.

"Life interests are very seldom taken as securities for money, unless in the case of insurance offices or professed money lenders; a life interest in itself being only of value for payment of the interest on the money, and the premiums on the policy of assurance which the mortgagor is required to effect on his life, and which policy in fact, forms the security for repayment of the money.

"There are many disadvantages in this description of security; the mortgagor may do some act to avoid the policy, or it may be necessary to call in the money during his lifetime, in which case much difficulty would be experienced, owing to the security not being marketable. If your client is seeking an investment for his money, and does not make the obtaining a high rate of interest his primary consideration, you will never advise him to accept this kind of security.

"A reversion in any description of property is likewise very undesirable as a security, owing to there being no fund available for payment of the interest until the reversion falls into possession. I here allude to a vested reversion, a contingent reversion being of course never thought of, as a security for money. Reversionary interests are always of a certain value, which can easily be ascertained by taking the opinion of an actuary. The character and responsibility of the mortgagor in a case of this sort is the most important consideration; but even if that is unexceptionable, the security still forms one of the lowest class; and no prudent man wishing to secure a good investment, where his principal may be safe and his interest punctually paid, will accept a reversion as a security.

"A policy of assurance ranks still lower than a reversion as a security for money advanced. There is not only no means of paying the interest on the mortgage money, but there has also to be provided from some source the annual premiums on the policy. The value of a policy of assurance may be obtained at any time by applying to the actuary of the company, and for a small fee he will inform

you of the office value of it. This value, if the policy is kept up, increases every year. This description of security is almost always confined to cases where the borrower is previously indebted to the mortgagee, who takes an assignment of the policy as the best or only security he can obtain."

Mr. Greenwood then makes some very just observations on the case of a trustee seeking an investment for trust-moneys in his hands, but we have already extracted so much that we must refer the reader to the volume itself.

"ENFRANCHISEMENT."

"In the case of an enfranchisement of copyhold property, *i. e.*, turning it into freehold, the title of the lord of the manor must (unless there is some stipulation to the contrary) be called for by you and inspected in the usual manner, in order to see if he has power to make the enfranchisement. He may be tenant for life of the manor, with power to enfranchise; in this case the terms of the power must be strictly followed. Should he be tenant for life, without power to enfranchise, he can then make enfranchisement under the authority of the 4 & 5 Vic. c. 35. The copyhold commissioners, however, in this case, must be parties to the deed.

"The practice is for the steward to prepare the deed of enfranchisement and to forward it to you, as the copyholder's solicitor, for perusal. Your duty will be to see that the property is correctly described, and, in case the lord be seised in fee, that the usual covenants for title and a covenant for production of the title deeds are inserted, an enfranchisement being, in fact, a purchase of the freehold. You must also take care that there is inserted in the deed an express grant by the lord of the rights of common, otherwise your client, who probably before the execution of the deed of enfranchisement had valuable common rights, will lose them by the enfranchisement. This is an important point, and will deserve your careful consideration. The act before referred to provides for this case, where the enfranchisement is made pursuant to its provisions; but it is doubtful whether the person taking the enfranchisement would remain entitled to the common rights unless the act be referred to in the enfranchisement deed. See the 81st section.

"It will be necessary to search for judgments, &c. against the lord of the manor; and if the manor is situate in a register county, to search the register for incumbrances, for a manor is within the Registry Acts, although copyhold property within it is not."

The more practical part of the directions relating to the preparation settling and engrossing of the various instruments will be found especially useful;

one example of the author's method of giving information we take from the article on leases, but not including that part relating to the preparation of the leases.

"Having prepared the draft lease, make a fair copy of it; and if you are not concerned for both parties, send it to the solicitor of the lessee for perusal. He will return it to you, and if no alterations are made, or none are made that you may fairly object to, your next step will be to engross the lease. Sometimes a long correspondence and several interviews take place before the draft lease is finally settled.

"The draft lease having been engrossed, together with a counterpart thereof, you will forward the draft and engrossments to the lessee's solicitor; but if there is no agreement, or if it is silent as to who is to engross the counterpart, the lessee's solicitors may claim to do this.

"After comparing the engrossment with the draft lease, the lessee's solicitor will return it to you for execution; and if he has, under the circumstances I have mentioned, engrossed the counterpart, he will forward such engrossment to you at the same time, in which case you will compare it with the draft, and return it to him for execution by the lessee. Your costs relating to the transaction should be forwarded to the lessee's solicitor about this time, in order that he may have an opportunity of examining them, and, if necessary, obtain the amount from his client. After you have obtained the execution of the lease by the lessor, make an appointment with the lessee's solicitor for the completion of the matter at your office. At the meeting you will exchange the lease for the counterpart, which you will examine to see if it is duly executed and attested. The lessee's solicitor will hand you the amount of your costs, and the matter will be completed.

"The above remarks will apply to leases of freehold and leasehold property; but with respect to copyhold property, it will be necessary to obtain a licence from the lord of the manor before the lease is granted, as the granting a lease by a copyhold tenant, without a licence from the lord, is a forfeiture of the copyhold. In this case it will only be necessary for you to write to the steward of the manor for a licence, informing him of the names of the parties, the property to be demised, the term to be granted, and the rent to be reserved, and he will forward you a licence to grant the lease, for which he will charge a fee, and a small fine will also be payable to the lord. These fees and fine, if not otherwise provided for, must be paid by the lessor. On applying to the steward for the licence, it will be advisable to inquire what interest the lord

has in the manor, as if he has only a partial interest, *e. g.* tenant for life without express power to grant licences to demise, the licence by him will only exist so long as his interest exists; in other words, if the lord be a tenant for life, and grant a licence to demise for twenty-one years, and live only seven years after the date of the lease, it will be necessary to obtain a new licence from the remainderman on his coming into possession, otherwise the estate would be forfeited. To avoid this it may be advisable to insert a proviso in the lease to the effect that, if, on the death of the lord of the manor, a new licence cannot be obtained from the remainderman, the lease shall determine. There is never, however, any difficulty experienced in obtaining a licence to demise."

Our readers will now be in a position to judge in some degree of the value of Mr. Greenwood's Book; but in addition we can assure them that it appears to be very well written, and to display great acquaintance with the *minutiae* and course of practice in conveyancing matters, and will be acceptable to the practitioner, and especially to those who have not had the opportunity of obtaining a practical insight into the course of conveyancing.

BILLS OF EXCHANGE—SUMMARY REMEDY—ACT EXTENDED TO COUNTY COURTS.

By orders in Council the Summary Procedure on Bills of Exchange Act, 1855 (*ante*, p. 63—65) has been extended to the county courts, and in part to the Court of Passage of Liverpool, and the Court of Record of Manchester. The order in council as respects the county courts limits the application to them of the Bills of Exchange Act "in respect of actions upon bills of exchange and promissory notes where the plaintiff claims a sum not exceeding £50." It further directs that the powers and duties incident to the provisions of the said Summary Procedure on Bills of Exchange Act, 1855, with respect to matters in the said courts of record, shall be exercised by the judges of the said courts respectively, or their respective deputies, for the time being, or in their absence by the respective clerks of the said courts for the time being; and that the enactments, Secretary of State's orders, practice, and forms in force, and used in the said courts of record, shall be adopted with reference to proceedings had under the said last recited act, so far as the same are applicable, *mutatis mutandis*.

Since the above order in council the following forms and suggestions have been issued by the judges of the county courts, and which will require the attention of the practitioner:—

Form of Summons under the Bills of Exchange Act, 1855, to be used in County Courts.

No. of plaint.

In the county court of —, holden at —.
(Seal).

Between A. B., plaintiff,
and
C. D., defendant.

To C. D., [name, description, and address of defendant]. You are hereby warned, that unless within twelve days after the service of this summons on you, inclusive of the day of such service, you obtain leave from the judge of this court, or, in his absence, from the clerk of this court, to defend this action, the said A. B., [name, description, and address of plaintiff] may proceed to judgment and execution.

Dated the — day of —.

Clerk of the court.

N.B.—This summons is to be served within six calendar months from the date thereof, or, if renewed, then within six calendar months from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Summons before Service thereof.

The plaintiff claims — for principal and interest [or, —, balance of principal and interest] due to him as the payee [or, indorsee] of a bill of exchange, [or, promissory note], of which the following is a copy, [here copy bill of exchange or promissory note, and all indorsements upon it], and also — for noting, and the sum of — for costs herein; and if the amount thereof be paid to the clerk of the court four days from the service hereof, no further proceedings will be taken.

Obtaining leave to defend.—Leave to defend may be obtained on an application at the office of the clerk of the court at —, supported by affidavit, shewing that there is a defence to the action on the merits, or disclosing facts shewing that it is reasonable that the defendant should be allowed to defend the action.

Indorsement to be made on the Summons after Service.

This summons was served by — on —, [the defendant or the defendants], on —, the — day of —, 18—.

SUGGESTIONS.

Entering plaint, &c.—The plaint and other proceedings in cases under the Summary Procedure on Bills of Exchange Act, 1855, should be entered in the books of the court in the same manner as in cases within its ordinary jurisdiction.

Plaint and summons.—Under the 6th section, the writ is, in the superior courts, the commencement of the action or actions against the parties named

therein; but, having regard to the proceeding and practice of the county courts, a separate plaint should be entered, and summons issued, against each party to the bill or note whom the holder seeks to charge.

Form of summons.—The form of summons is framed upon the form of writ given in the schedule to the act. A form of order has not been suggested. The order, under the present practice of the courts, is sent to the defendant merely to warn him of the course he should pursue, so as to avoid further consequences, and is not a record of the court, for the record of the judgment or order is the entry in the minute-book. The suggested summons gives this warning, and as the plaintiff will be entitled to have judgment and immediate execution after the lapse of the twelve days, if the defendant shall not have obtained leave to defend, no order need be served on him.

Payment into court; leave to defend necessary.—It was at first thought that if the defendant should pay into court the sum claimed, he would be entitled under the provisions of sec. 2, to have leave to defend as a matter of course; but the judges of the superior courts have decided, that in such a case it is equally necessary for the defendant satisfactorily to shew, upon affidavits, that good grounds exist for granting leave.

Security by bond.—The security to be given under this section and the two following sections should be by bond, as in cases of appeal.

Copy of defendant's affidavit to obtain leave to defend.—As it is desirable, where the defendant shall obtain leave to defend, that the plaintiff should be informed of the defence intended to be set up, the defendant should, before such leave be granted, be required to deliver to the clerk a copy of his affidavit, and that such copy should be forwarded to the plaintiff at the same time as the notice informing him that such leave has been given.

Hearing after leave to defend.—If leave to defend be given, the first convenient sitting of the court should be appointed for the hearing of the cause, and notice according to the form No. 2 should be forthwith sent to the plaintiff, by prepaid post letter or otherwise, and a notice according to form No. 3 to the defendant.

Applying to set aside judgment.—The application, under sec. 8, to set aside the judgment is one that it appears desirable should be made to the judge of the court only; but, until the judge can hear the same, it will be necessary that the execution should be stayed; and this may be done, under that section, on the defendant giving security to abide the decision of the judge, and in accordance with the practice in cases of appeal, under rules 151 and 152.

THE POSITION AND PROSPECTS OF SOLICITORS.

From an address delivered by Mr. Beaumont, of Warrington, at the last meeting of the Manchester Law Association, we select the following remarks upon the profession, and the state of the law, which may be of interest to our readers.

Lawyers necessary to Society, but Society not made for Lawyers—Jack Cade and Peter the Great.—Mr. Beaumont said "There was no greater mistake than to suppose that society was made for the lawyers except to suppose that society could do without them. There were times when sense and society seemed to part company, and when people almost imagined that law was an excrescence that might be lopped off without injury to the body politic. In Jack Cade's insurrection, Dick, his aide-de-camp, advised that the first thing to be done was to kill all the lawyers, to which Cade replied that he intended to do no other, and then gave his reasons"; and in the great civil wars under Charles I. one writer gravely ascribed the war and all its troubles to the lawyers; but when the paroxysms were over, reason resumed her sway, and people had the sense to see that only despots could dispense with lawyers. One of the few amusing writers in a lawyer's library had described a visit of Peter the Great, when he came to England, to Westminster Hall, where, seeing the lawyers' wigs like a sea of cauliflowers in a kale yard, he asked who were the wearers.

"Lawyers, the interpreter replied.

Lawyers? that never can be true?

In all my realms I have but two,

And to those realms should Heaven once more

Be pleased their monarch to restore,

One of these two—but what the Czar meant—

Whether to raise him to preferment

Or *exa. per coll.* was his intention,

The interpreter forbore to mention."

But if society could not do without the lawyers, it was surely its interest to see that the studies, education, station, and intelligence of those who administered the law, were suitable to the responsible duties they had to perform."

The modern lawyer an improvement on the former race—Utility of Law Societies.—"He was happy to say that, comparing the present time with the past, he took comfort for the future. His (the chairman's) memory was able to go back to the time when an evening spent with a party of lawyers was an evening spent with a party of pedants, and smacked of latitudes, capiasces, qui tams, et hoc genus omne. His hearers would bear him witness that it was not so now. In those days hard words were sometimes used to frighten a refractory offender. He well remembered an old attorney at Congleton using this weapon towards a blacksmith, who, to the lawyer's

annoyance, had set up a smithy near his office, when, having sent for the man and remonstrated with him without effect, he threatened him with a special testatum capias ad respondendum, which frightened the man into a promise to remove his smithy. He did not know whether they could justify themselves in a similar proceeding, but he thought now-a-days it would not be approved. Some forward steps had latterly been made; but in order to accomplish any considerable amount of good, they must unite together on all points; that was the most necessary. What could one individual do to raise the condition of the profession? They must unite and organise. They must have as many eyes as Argus; and more hands than Briareus. It was by union only that they could do anything. If they united they could effect a great deal. They could bring to bear upon the public and the legislature the opinion and sentiments of those who were best acquainted with the subjects in which they were interested in relation to the laws, whether for the purposes of legal reform or otherwise."

Reform of Courts of Equity.—"He would now allude to what such societies as the Law Association had already accomplished. If the Court of Chancery was now better than it used to be, it was owing to the efforts their own and other kindred societies had used. If they had not accomplished all they could desire, they might derive some satisfaction from the recollections that in the days of the Commonwealth those courts were too strong even for the power of Oliver Cromwell, who promised that he would reform them thoroughly, but was afterwards compelled to admit that 'the sons of Zeruah prevailed and were too strong for him.' But the Chancery system was now beginning to give way, and he hoped that very shortly they should be able to get it into a shape that would still further lessen its abuses and corruptions."

Destruction and not reform of Ecclesiastical Courts.—"There was another thing which was a most crying evil, and which he hoped those associations would take in hand—he alluded to the Ecclesiastical Courts. It had been said of public societies, that they could neither be put into the pillory, nor summoned to the Ecclesiastical Courts. For himself, he would sooner be put into the pillory than be summoned to the Ecclesiastical Courts, which were the relics of a past age that had long survived the condition of the times that had called them into being, and now required to be abolished. He had no doubt that he should soon see those courts begin to topple and fall, and he desired that this society should use its influence to that end."

Education of Lawyers—Law University—Preliminary Examinations.—"The advancement of the

legal education and status and condition of the body of which they were all members, was a question of the utmost importance. What guarantees so powerful as those could a man give to society that he would discharge the important duties which were confided to members of the legal profession with faithfulness? Lawyers were often, of necessity, entrusted with secrets which a man would divulge to no one else, and with the transaction of business arrangements of the most important character; and it was to the honour of the body that the instances were very rare where those confidences were betrayed. But it was incumbent on them to endeavour to make the profession a more highly educated body as well as to give it a better status in society; not on their own account only, but for the sake of society, which would be the gainer also; in fact, both the profession and society would be gainers by such a result. The question which was now about to engage the notice of the public—the education of lawyers—was one well worthy their highest attention. He considered that if the proposed *Law University* was established, they ought to have preliminary examinations for the different grades in the profession. He would have examinations for apprentices at law—as they were termed 500 years ago; and he would have degrees conferred, of bachelors of law, for those who were qualified for the bar; then masters of law, and then the still higher grade of doctors of law; and the progress from one rank to the other should be open to the competition of all who chose to enter it. He would let every one advance to the rank next above that he had attained, if he would qualify himself for it; and he was convinced that the prospects in such a system would have a tendency to raise those who were engaged in this competition. He would give to attorneys and solicitors the option of rising even to the bench itself. In Scotland, the writer to the signet was capable of being made a judge; and why should not attorneys in England aspire to the rank of judges at least in the county courts? He knew many men in the profession who were quite as well qualified as those who now held those positions. While the *Law University* question was under discussion, he thought they ought to make an effort to open the door for promotion from one step to another, till the highest dignities should be within the reach of those who chose to enter into the field. It would be to the interest of society, as well as to their own. It would afford the best guarantee society could have, that the members of the profession would faithfully discharge their duties towards it."

CHARGING ORDER AFTER ASSIGNMENT WITHOUT NOTICE OF CHOSE IN ACTION.

The case of Watts v. Porter (1 Chron. pp. ii, 93; ante, p. 75-78) questioned.

It will be remembered that we have before (vol. i, pp. ii, 93, and ante, p. 75) noticed this case, and as doubt has been thrown on the correctness of the decision, and the point is one of great importance, and peculiarly so to solicitors, it being not a solitary instance of a solicitor being made responsible for negligence in a matter of law upon which the profession, if not the judges, have differed in opinion. The point arose on sec. 14 of the 1 & 2 Vic. c. 110, enabling a judge to order stock, &c., standing in the name of a judgment debtor, or of a trustee for him, to be charged with the payment of the judgment, whereby the judgment creditor is to be entitled to the same remedies as though the debtor had himself charged the stock. The debtor charges the stock in favour of A., who gives no notice to the trustees in whose name the stock is standing, and then the judgment creditor obtains a charging order. Which is to have preference? The majority of the Court of Queen's Bench said the judgment creditor had such preference, as a subsequent chargee for value, giving notice, before the first chargee, would have had; deciding, in effect, that the trustees of the stock were not trustees for the first chargee before notice; whilst Erle, J., dissenting, held that the judgment creditor's rights were subject to those of the first chargee, i. e., that he had those remedies only which affected what at the time of the charging order remained the property of the judgment debtor. In the recent case of *Beaven v. Lord Oxford* (2 Jur. 121; Week. Rep. 1855-6, p. 275), deciding that judgment creditors are not purchasers for valuable consideration within the 27 Eliz. c. 5, and that sec. 13 of the 1 & 2 Vic. c. 110, does not give a registered judgment creditor priority over a voluntary settlement made by the judgment debtor prior to the judgment, much discussion arose on the above case of *Watts v. Porter*, and, in their judgments the Lord Chancellor and L. J. Turner made some remarks thereon which it will be proper for our readers to bear in mind in connexion with the statements in vol. i, pp. ii, 93, and ante, p. 75, and to which reference should be made. The Lord Chancellor said: "The argument in the Queen's Bench (in *Watts v. Porter*) was this: there having been a judgment debtor entitled to a sum of money standing in the name of the trustee, and that fund being mortgaged, not exhausting the whole fund, but mortgaged to a large extent, but the mortgagee not having given notice

to the trustee, and in that state of things the judgment creditor obtaining a charging order, and the statute saying that order shall have the same effect as if the judgment debtor had charged, the Court of Queen's Bench said, that if the judgment debtor had charged the stock in favour of the judgment creditor, and the judgment creditor had given notice to the trustee, as he did before notice was given by the first mortgagee, he would have precedence. No doubt, if that were an actual charge, it would have been so; because, in order to complete the title of the mortgagee to such property, it is not only necessary that the mortgagor should have been bound as between him and the mortgagee, but the trustee must also have been bound; and if notice is not given to the trustee by the first mortgagee, a second mortgagee coming in and giving notice will have precedence. That was the case on which the Court of Queen's Bench had to act; and they held that in that case the judgment creditor under this order was precisely in the same position. The statute had given the remedy against this new species of property; he was to be considered just in the same position as if an actual assignment had been executed by the debtor; he, first giving notice, was to have the prior claim. I confess it seems to me open to argument whether Mr. Justice Erle's view of the case was not the right one, and that it was doubtful whether the statute meant anything more than that the interest of the judgment debtor should be liable to be affected, without reference to what might be the equitable consequences of notice or want of notice. At the same time, I do not at all mean to say that the decision which was come to was not correct. If it does clash with our decision, then I am bound to say that I think the decision was wrong. I do not at all mean to say that it does clash with it, and therefore, quacunqve via, we do not think that that ought to influence our decision."

Sir G. J. Turner, L. J., said: "If it be necessary to give any opinion upon the case of *Watts v. Porter*, I confess, on examining it, it is difficult to distinguish these other cases satisfactorily; though there are distinctions to be pointed out between them; upon the broad principle perhaps it is difficult to distinguish them. On looking at the judgments (in *Watts v. Porter*) I prefer the opinion of the learned judge, *Erle, J.*, to the opinion given by the other three judges upon this point; and I think so for this reason. On examining the opinion of the majority of the court in that case, they seem to have proceeded upon this ground, that the 14th section charges the entire stock, because they said that the entire stock was held in trust for the debtor, and that until notice had been given by the mortgagee of the assignment, the whole stock remained in trust for the debtor, there

being no privity between the mortgagee and the trustee until the notice was given; so that the decision of the majority of the court rested on the ground, as it appears to me at least, that there was a want of privity, which prevented there being any trust in favour of the mortgagee until the mortgagee had given notice to the trustee. But, with great deference to that opinion, the equitable interest which was vested in the judgment debtor passed from him by the assignment to the mortgagee, and after the mortgagee took that equitable interest the trustee ceased to be a trustee for the judgment debtor, although it might well be that the mortgagee could not charge the trustee for breach of trust until he had given notice of the mortgage. If, then, the trustee had ceased, by the assignment to the mortgagee, to be a trustee for the judgment debtor, to that extent the 14th section of the statute had no application, because the 14th section of the statute merely applies to stock standing in the name of the judgment debtor, or of some person or persons in trust for the judgment debtor. It seems to me, with great deference to the opinion of the Court of Queen's Bench in that case, that sufficient attention has not been paid to the distinction between the existence of the trusts and the remedy against the trustee."

EDUCATION OF ARTICLED CLERKS.

On the advantages that would result to Articled Clerks from a College or more Liberal Education.

SIR,—As the *LAW CHRONICLE* is the only organ that is in any degree devoted to the interests of an articulated clerk, and as this seems the fitting-time for their appearance, I trust you will give insertion to the following remarks on the above subject—a subject that is of the highest importance to our portion of the legal community; and (though perhaps more remotely) to the world at large. I am an articulated clerk, and it appears to me and to others with whom I have conversed on the matter, that the present system of training to which we are subjected is in a high degree defective, and not at all fitted to make us either gentlemen or enlightened lawyers, but is at the same time pre-eminently qualified to contract our ideas—to diminish our reasoning faculties—to make us mere machines, and, in some, I had nearly said a great measure to counteract those liberal, generous, and gentlemanly feelings which most young men possess when they enter the profession, and which a more liberal course of study would have supplied in some cases, and aided in developing in others. There is no good attempting to conceal the fact that the profession of the law has, from some

cause or other, acquired a widely spread renown for chicanery and deceit, and is popularly supposed to be one redolent of all sorts of knavery, and sharp practice. In most cases the impression is unfounded and unjust, at the same time, however, I must admit that those popular characteristics may occasionally to a certain extent prevail, and truth compels me to say that of all professional men an attorney is the worst educated, the most contracted in his ideas, the least acquainted with general literature and the scientific topics of the day. He is wonderfully ignorant of those polite accomplishments which Ovid says: "*emollit mores nec sinit esse ferus*," and is in lieu thereof endowed with such an amount of caution and some other peculiarities characteristic of a certain northern nation at the expense of ingenuousness and manly ability, that one of our cleverest legal scholars has characterised attorneys as a race "*penes vulgus*" and has said that "it is a great evil that an attorney's clerk can be called to the bar." I shall now attempt to show how those class peculiarities, perhaps innocent in themselves, might be removed, and how the time might come when no learned gentleman could sarcastically observe, "some attorneys can read Latin, I believe."

An articled clerk enters the profession at perhaps the most critical time in a long life, at a time when he is very susceptible of impressions for good or evil. We will now take an instance, and suppose, as is generally the case, that our young friend is sent from home to some town or other, that his premium (often a pretty handsome one, and for what?) has been paid; we can fancy the last hearty pat on the shoulder, the last fond look of a father, impressed with the idea that his progeny, having at length arrived at man's estate, is on the high road to eminence and distinction! when, forsooth, he has consigned his son to four or five years of disgusting and thankless drudgery, and to the society of those (I allude to copying clerks) with whom he would not allow his son to associate on any terms, was he conversant with their morals, manners, and the general tone of their conversation. We must, however, hasten on, and imagine the parting and the cheering, but beautifully imaginative and romantic, thought that suffuses the old gentleman with a melancholy happiness—the thought that his son's preceptor will carefully look after young hopeful's interest and legal training, or that, at any rate, he will treat his son as the son of a gentleman, and as a pupil for whose education he has been generously remunerated. But now for a peep behind the scenes. Behold young hopeful installed in full canonicals, that is, with pens, ink, and paper, at a desk hewed, hacked, and adorned with many a strange device, situate in an office gloomy and dark, having for a

prospect a blank wall, soot incrusting, house and chimney tops, animated with an occasional grimalkin or two—true brothers of lawyers, and very emblematic, both being members of one race—the *feelies*; there he will remain for the term of his imprisonment (I can call it little else), uncheered by one word of encouragement, never inspirited by one smile of approval, never addressed by his master save it be about some dry detail of business or other from which probably the clerk will not acquire one atom of useful legal knowledge, and concerning which he will receive instructions only remarkable for their paucity, their want of intelligence, and the half-grumbling and inaudible manner in which they are delivered (a manner which seems to say I am inconceivably clever, and for the honour of standing in my august presence, and for the pleasure of occasionally seeing me, you ought intuitively to know what I want, and what is more, you ought to do it). But you may say, Mr. Editor, why not ask for a little more information, and more intelligible instructions. A good idea, but simply ideal. Why, Sir, if an unhappy clerk were unguardedly to request a little fuller acquaintance with the matter, a semi-sarcastic and wholly ill-tempered smile would take possession of (illumine would be a misnomer) his master's face, and he would hear a pettish "don't bother me, Mr. ———; you know as much about the matter as I do." But to pursue the thread of my story: Every circumstance proclaims to the wearied and desponding clerk that he is looked upon by his master during his incarceration as his own private and peculiar chattel—that the preceptor considers he has a vested right in him for a term of years, and that he was created for his sole use and benefit (what else can the poor clerk think), and that, as such, he must make the most he can of his bargain. No thought of counselling his clerk as to the best manner in which he may employ his time—no thought of teaching his underling (for such in truth he is) his profession, and the duties of his age and station, enter the teacher's head. No; good, easy-going, sensible man—he either leaves his clerk to his own devices, or works him. In fact, poor lad, he is for the time being a bondsman, save that were he a slave for life he would be treated with more kind consideration—his legal studies would then be marked out for him—attempts would then be made to educate him—he would then be told what duties he was entering upon—what studies he should pursue for it would then be his master's interest so to do. I am led to make the foregoing remarks from the circumstance that an attorney's own son, when articled, is treated very differently to an alien and strange clerk; but with our articled clerk, being an alien, the case is different. Does the clerk wish to

ask what books he should read—does he seek information on some professional point—does he require an explanation of some difficulty which has arisen in the course of his reading—he either feels afraid or ashamed, but often too indignant, from the little interest taken in his proceedings, to put the query; and if at last he summons up sufficient courage to make the attempt, he is met with replies certainly amusing, highly vexing, but still amusing, from the apathetic supineness and the listless ignorance with which they seem imbued—rarely, in any instance, does the master communicate information spontaneously. If the clerk, intrusted with an affair that requires in its transaction skill and talent beyond his years and opportunities, should fail, the entire blame would be attached to him, though he might have been wanting by reason of the “you know all about it” brevity of the instructions given him when the matter was first placed in his hands. Should he be successful, “*Alter tulit honores*,” he receives not one word of that encouragement and approval which all young men require in the commencement of life. This is most unjust. But what I principally complain of is the total lack of interest taken in the pupil’s welfare by the master, which in effect often sours a noble nature, and ossifies a feeling heart. Your publication, with other legal papers, urges upon us the necessity of intense study and deep reading. I now ask, in the name of common sense, what time or inclination can we have for reading in our leisure hours when the day has been spent in poring over dusty deeds, in engrossing greasy ones, or in some of the other pleasurable little peculiarities of an attorney’s office (but which are only transacted by clerks) in a gloomy and badly-ventilated office, with the dyspeptic-looking fire aforesaid. Must we not have some recreation? Yet, if we neglect reading, we run the risk of being utterly disgraced. Surely too much valuable time is devoted to what is called practice, too little to deeper and more important legal studies; and I feel assured, and I ought to know, for I suffer from this sad red tapery and routine myself, that if an articled clerk were to rely upon the practice he sees in an attorney’s office, and nothing else, he would never become an accomplished lawyer, perhaps never pass the present examination. Our “last year” in London, which is devoted almost exclusively to reading, and of which very little is bestowed on practice, is our salvation. The custom of causing articled clerks to serve writs and process does not probably tend to make them gentlemen, to fit them for their future rank, or much to the refinement of their manners and feelings, though undoubtedly were the position they intended to fill in society that of sheriff’s officers, writ-serving would be a pre-eminent *sine qua non*.

Attorneys, also, have a nice pleasant way of telling their articled clerks (after the execution of their articles, remember) that they make no distinction in their manner of treating them and their paid employees; this possesses the virtue of candour, at any rate.

I have painted the picture as it really is, and it is not too deeply shaded; the circumstances and conversations I have alluded to are realities—they have occurred, and are constantly occurring, and are not solitary instances. Let us now see if we cannot throw a gleam of sunshine upon the sketch; perchance a ray of light may somewhat alter the faces and lineaments of some of the characters there portrayed. What say you to the formation of a large collegiate institution for the education, not of us, for we are now suffering, and our time is near at an end, but for others who will follow in our footways, and who will else undergo what we have undergone. Let it be on some such plan as the following:—Make a compulsory curriculum of some three or four years absolutely necessary, and before entering let each law student (would that the hateful name of clerk was for ever forgotten, as it would then be) pass a matriculation or preliminary examination in Latin, Greek, modern languages, and general literature, so that we might have a security that none but those well qualified by education, at least, could enter the profession, and the class previously “*penes vulgus*” would not then have an opportunity of disgracing it—a consummation devoutly to be wished for. Let the college be supplied with professors, lecturers, and other proper university officers. Let there be courses of lectures on legal subjects, and occasionally some on general literature. Medical jurisprudence might be studied with great profit. The student, upon passing the necessary examinations, could then, with *advantage to himself*, enter a practising solicitor’s office for a year or two; he would then be able fully to comprehend the practice he would there see. This plan would not be more expensive than the one now pursued, and certainly it would be attended with happier results. It seems strange that those training for the law, the most difficult of all subjects, should not partake of the advantages of an university education when the students of other professions comparatively easy are gifted with opportunities we sigh for in vain. I would also direct attention to the expediency of establishing honorary distinctions in connection with the above. The remarks I have made on the profession will, I trust, be taken in good part; they were made to remove the only blot on its otherwise fair escutcheon. There are many noble attorneys, a credit alike to their order and to humanity. I am not ashamed either of my

profession or class; in testimony whereof I subscribe myself an

ARTICLED CLERK.

NOTE.—We have had great doubts about the insertion of the above communication, as some of the remarks in it relative to solicitors are clearly unjust and inapplicable to them as a body—the acts or behaviour of individuals are not justly to be imputed to the general body. Had the letter not been written by an articulated clerk, and with special reference to the welfare of the body to which he belongs, we certainly should not have given it insertion. On consideration, and particularly looking at the latter part, we have concluded to insert the communication, but we trust we shall not be called on to insert any rejoinders respecting the charges made against solicitors; we do not indorse any such charges, and would rather that our correspondent had not indulged in them. The object of our correspondent is a right one, so far as he seeks to raise the intellectual character and respectability of the profession, but we cannot admire the tone of some of his remarks, nor do we think he should entertain such repugnance to office work or to associate, so far as business is concerned, with the ordinary clerks. Whether the plan proposed by our correspondent is one likely to be beneficial, or is at all practicable, is open to consideration and discussion.—EDS.

VENDORS AND PURCHASERS.

(ante, pp. 133—135).

NON-COMPLIANCE WITH REQUISITIONS.—*Notice by purchaser to vendor to comply with requisitions—Rescinding contract on non-compliance with requisitions—Making time essence of contract* [ante, p. 133].—*Declaration of seisin free from incumbrances, form and effect of* [Nott v. Riccard, 26 Law Tim. Rep. 267].—This case shows the circumstances under which a purchaser may rescind his contract, and seems to establish that after a vendor has expressly refused to satisfy objections of which any are valid, no further time need be given. Another point in the case was as to the sufficiency of a declaration of seisin under a condition that a declaration of seisin in fee free from incumbrances for a certain time should be accepted by the purchaser. It appeared that the vendor did not satisfy a valid objection made by the purchaser, after a correspondence in which the vendor stated that he could not and would not furnish any better evidence, and the purchaser gave him notice to furnish the evidence within fourteen days, or in the alternative that he should rescind the contract. The Master of the Rolls held, that the vendor having made

default, the purchaser was entitled, upon the expiration of the fourteen days, to treat the contract as at an end. *Quære*, whether the purchaser was bound, under the circumstances, to have given the vendor any notice prior to rescinding the contract. In this case a condition stated that the purchaser should be satisfied with a declaration of the seisin of E. in fee free from incumbrances for a certain period: Held, that the declaration must strictly comply with the terms of the condition, and that a declaration stating that the declarant had been employed by E. upon the estate as a thatcher for a period of twenty years previous to the date of her will, during which period he had also resided in the parish, and that of his personal knowledge the property had been in the possession of the said E. for more than thirteen years prior to the date of her will, was not sufficient (Nott v. Riccard, ut sup.). The Master of the Rolls in giving judgment observed:—"I think that the plaintiffs are not entitled to enforce specific performance under the circumstances of this case. I quite assent to the argument, that where time is not made of the essence of the contract originally, it is difficult to make it so afterwards; and that where a party gives another notice to do a certain thing, he is bound to give a reasonable time for the performance of the thing insisted on. If this had been an ordinary case of a purchaser requiring a further declaration to be made, I should not have thought that a notice to the vendor to furnish it within fourteen days was reasonable. But here the plaintiffs had insisted, two months before, that they had furnished the purchaser with a declaration which satisfactorily complied with the condition; and throughout the correspondence which ensued, the plaintiffs refused to give any further information. Now, under these circumstances, how long is a purchaser to be held to his contract? The vendor says, 'I will not give you any better proof of title;' the purchaser is then entitled to rescind the contract. If the vendors had said they intended to give the purchaser a satisfactory answer, I agree that fourteen days would not have been a reasonable time; but in this case I am not clear that the purchaser was bound to give any further time for that purpose; and if he were, fourteen days was sufficient for the vendors to decide whether they would rest on the title they had shown, or would comply with the purchaser's requisition. Both parties in fact put the matter upon the issue, whether a good title had been shown. At the expiration of the fourteen days' notice, the purchaser declared that the contract was rescinded, and brought his action for the deposit and damages. The vendors insisted that they had all along satisfied the condition. What has subsequently taken place cannot,

in my opinion, vary the case. If there was a good title shown at the time of the notice, then the plaintiffs are entitled to a decree; if not, I think the two months which had elapsed after the requisition was made justified the defendant in putting an end to the contract, upon the refusal of the vendors to satisfy his requisition and make good the title. I am of opinion that a good title had not been then shown. The third condition stipulated that the purchaser should be content with a declaration of the seisin in fee of Elizabeth Gaye, free from incumbrances. I express no opinion whether a declaration by Henry Thomas, complying with this condition, would have been sufficient, or whether he could be assumed to be in a position to know the facts. But the declaration did not satisfy the terms of the condition; it is only a declaration of possession in some character or other. It is contended that in the absence of evidence to the contrary, this is a sufficient declaration of an ownership in fee; but why were the words "seisin in fee-simple free from incumbrances" inserted in the condition, if the declaration was not strictly to follow this language? In that case, the terms of the condition itself should have been qualified. I am of opinion, therefore, that the declaration is not sufficient. This concludes the matter. It is true that the purchaser had insisted on other objections which could not be supported; but express issue was taken on the requisition as to the declaration, and upon non-compliance with that, the purchaser declared that he should rescind the contract. The bill must, therefore, be dismissed with costs."

ATTESTED COPIES OF DEEDS.—*Conditions of Sale*—*Non-production of deeds not in vendors possession*—*Attested copies to be at purchaser's expense*—*Costs of successful suit* [*Abbott v. Darnell*, Week. Rep. 314].—The point on this case related to the common one in conditions of sale precluding a purchaser from requiring, at the vendor's expense, attested copies of deeds not in the vendor's possession. The conditions stipulated in effect that the purchaser should not be entitled to demand production of any deeds, &c. not in the possession of the vendors, and that all attested and other copies required by the purchaser, should be procured at his expense. But the condition in question was framed in a very comprehensive manner, embracing other matters: "The purchaser shall not require or be entitled to demand or insist upon the production of any title-deeds, evidences, or writings which are not in the possession of the vendors; and all recitals of births, deaths, marriages, descents, intestacies, or other facts or events contained in or to be inferred from any deed or document of title dated thirty years since or upwards, shall be deemed conclusive evidence

thereof; and all attested and other copies of, or extracts from, deeds, wills, court rolls, or other documents of assurance, and all deeds of covenant, and all certified or other copies of parish or other registers, and all other evidence as to deaths, intestacies, or heirships, and all other affidavits and declarations which may be required by the purchaser for the purpose of examination with, or verifying or proving the abstract, or any fact, matter, or thing therein, as in deeds or other documents or assurances contained, set forth, or recited, or otherwise, or for any other purpose whatever, shall be respectively sought for and procured at the expense of the purchaser; and the purchaser of each lot shall, at his, her, or their own expense, collate the abstract with the title deeds and other muniments of title or the court rolls, at the respective places where the same are now deposited or registered, and shall not require them to be produced elsewhere."

The plaintiff became the purchaser of two lots, and filed a bill to enforce his right to attested copies at the expense of the vendor, contending that the vendor ought to have distinctly explained that certain lots, including those purchased by the plaintiff, were held under one title, the deeds relating to which would be delivered to the largest purchaser, and attested copies, if required, provided for other purchasers at their own expense, and that the words "sought for and procured" in the condition must be read as referring only to such documents as were not in their possession, especially as the condition admitted by implication that some title-deeds were in the possession of the vendors. The plaintiff's bill, however, was dismissed with costs, V. C. Stuart observing: "The question in this case turns upon the construction to be put upon the seventh condition of sale, the language of which is undoubtedly somewhat obscure. According to the general principle, a purchaser is entitled either to have the actual title-deeds relating to his purchase, or attested copies thereof at the expense of the vendor. If this expense is intended to be transferred to the purchaser, such intention ought to be most clearly expressed. Now, the condition of sale to which I am alluding certainly starts with language that appears to apply (as contended by the purchaser) merely to the *verification of the abstract*, but its purport widens as it proceeds; and I consider that the purchaser is plainly told that if he requires attested copies, for any purpose whatever, he must obtain them at his own expense. The use of the words "sought for and procured" has been criticised, and, perhaps, "made and supplied" would have been more appropriate; but I think that the fair interpretation of the entire condition is as I have above stated. As to the costs of his suit, I was at first inclined to doubt whether the

plaintiff was not so far driven into court by the threat of the defendants to annul their contract, that I should not be justified in dismissing his bill with costs; more particularly when I consider the obscurity which to a certain extent pervaded the frame of one at least of the conditions of sale. But, looking at the general tenor of the correspondence which has passed upon the subject, and considering, as I do, that the only fair interpretation of the language in question is that which I have already given; I do not think that the plaintiff is upon the whole entitled to be relieved from the ordinary penalty attendant upon a want of success in this court.

OPENING BIDDINGS.—*Sale by the court*—*Not after eight days from approval of chief clerk's certificate of purchase*—*Vacations not excluded*.—Ordinarily, under the new practice a purchaser is in the same position, after the certificate of the purchase has been approved, as he was under the old practice when the report of the purchase had been confirmed absolute. Under that practice, even a large advance of price was not a special circumstance sufficient in itself to induce the court to open the biddings after the report had been absolutely confirmed. Indeed, under the old rule, an attempt to re-open the biddings after a man had been absolutely reported a purchaser, came too late unless extraordinary circumstances could be shown. The new practice substitutes, in place of an order to confirm the master's report, the filing of a certificate, and the lapse of a certain number of days. It has been decided, overruling the decision of V. C. Stuart (1 Jur. N. S. 1083), that the chief clerk's certificate of a purchase, signed and approved by the judge, becoming after eight days equivalent to a report absolutely confirmed under the old practice, the biddings will not be opened except under special circumstances, and a mere advance in price, however large, is not a sufficient special circumstance. *Ware v. Watson*, Week. Rep. 1855-6, p. 223; 26 Law Tim. Rep. 251.

MISTAKE.—*Specific performance*—*Omission of a term of the stipulation by accident*—*No specific performance where clear mistake*—*Parties left to legal remedies*.—The owner of a public house stated in a letter to brewers that the terms of letting were a certain rent and for a stated time. The brewers, after sending an agent to look at the house and discuss the terms, agreed to take it according to the letter; subsequently the owner required a premium of £500. The brewers filed a bill to enforce specific performance, and the owner adduced a memorandum made by the brewer's agent, to show that the £500 formed part of the bargain, and called evidence to prove that in a previous offer to another brewer that sum was mentioned. The former evidence failed, but the latter was confirmed. The

brewers had commenced alterations in the premises. Held, that the offer to the plaintiff omitting the £500 was clearly a mistake, and that specific performance should not be decreed. (*Wood v. Scarth*, 26 Law Tim. Rep. 87, 1 Jur. N. S. 1107). In his judgment, V. C. Wood observed:—"It would be of the utmost danger to allow a person, thinking he has made a bargain, to vary by verbal testimony the terms of a written agreement; that I would not allow even if supported by the oath of the defendant swearing that he had always intended to ask for that premium; nor even although supported by his agent's evidence, that the vendor had uniformly instructed him to insist upon such a premium. Here, however, I consider that I have some written evidence of a mistake. In the same letter of the 8th July in which the defendant makes the offer to the plaintiffs, he says that he is making the offer to all the brewers in rotation. Now, I think I am justified in thinking that this offer so made to the other brewers must be taken to mean the identical offer which he thought he was making to the plaintiffs, and I find that he had actually just before offered the premises to Messrs Elliott and Watney at the same terms including the £500 premium, which offer they had declined. I cannot, on the other hand, assume that the defendant had thereupon at once come to the determination to leave out the £500 premium. It is not consistent with sense or with the dealings of mankind that he should cut down his offer by £500; because the first comer, to whom he had given the refusal, had declined it. It becomes almost as if he had said in his letter, I have made Messrs Elliott and Watney an offer; I repeat that offer to you, viz., and then stated the terms as in the letter of the 8th July, without mentioning the premium. That would perhaps be a clearer case, but really what he has said brings it almost to the same thing. Then the question is whether the defendant has by any statements put forward by him prevented himself from being relieved from this mistake. The Duke of Beaufort v. Neild (9 Jur. 813), would not prevent the relief now sought. That a person is not to be brought here to perform a contract which he never intended to enter into is clear. Perhaps no authority is better than that of the Marquis of Clanricarde v. Standerown (6 Ves. 328), where it was refused to carry out the written contract either with or without the variation proved by parol to have been intended: not without the variations, for it was never intended to enter into that contract; not with the variations, for it is not lawful to allow a written instrument to be varied by such parol testimony. But here the question is what is the effect of the defendant having said, not that the whole contract was a mistake

throughout, but that before the purchaser entered on the land, he (the vendor) told the purchaser's agent what the real terms intended by him were, and that the latter agreed to them when that turns out not to have been the fact. How is that to affect the question? I do not find it necessary to rely in the least upon the defendant's personal testimony. I rely upon what I find in the letter signed by him, and upon what Elliott and Watney state to have been the offer made to them, to say that because the defendant has set up a double proposition, I made a mistake, and you knew it and has failed in the latter branch, he is, therefore, to be prevented from having the benefit of the first branch of his defence, is I think going too far. On the other hand, I conceive that the plaintiffs had every reason to believe, and did believe, that they were proceeding *bond fide*—that they had entered into a valid contract for a lease without any premium. But notwithstanding that, feeling bound to dismiss the bill, I cannot give them any costs; but I dismiss it without costs, without any prejudice to any action which the plaintiffs may be advised to bring for damages, and without prejudice to any right they may have to have their costs of this suit included in that action. It would be only reasonable, after the defence set up, that the plaintiffs should have their costs, but I cannot give them now."

LEASEHOLDS.—*If any lots unsold the vendor to stand in place of largest purchaser to grant underleases*—Covenants to be entered into by and to the purchaser, being underlessee, of part of premises demised to his vendor.—The following case is one of great importance in the practice of conveyancing, settling as it does two points relating to sales by lessees where there is a stipulation that in case any of the lots are unsold the vendor will stand in the place of the largest purchaser, for granting leases to the purchasers, and as to the covenants, on an underlease, of part of the premises held by the vendor under a single lease.—The two points referred to as decided, and the decisions thereon were as follows: 1. a clause in the conditions of sale by auction, provided that "if any of the lots remain unsold, the vendors shall stand in the place of the purchaser of the largest part in value," to grant underleases—some of the lots were unsold at the close of the auction, but were afterwards sold; it was held, that this clause having come into operation, the purchaser of each lot had a right to have this condition personally performed by the vendors; and that it was not competent for them to assign their estates to any one of the purchasers, and to compel the other purchasers to take their underleases from such purchasers. 2. Where a lessee upon a sale by him underlets part of

the premises demised to him; the under-lessee covenants on his part to perform all the covenants of the original lease in respect of the part sub-demised to him, and the vendor covenants on his part to perform the covenants in respect of the remainder. (*Brown v. Paull*, 26 Law Tim. Rep. p. 232). V. C. Kindersley in the course of his judgment observed: "Irrespective of the language of these conditions, the usual course, where property is sold under the direction of the court, and where there are several lots under one common original lease, is for the purchaser of the largest lot to take an assignment of the whole lease himself, and to make underleases to the purchasers of the other lots; and in such case it is usual to introduce a stipulation that the purchaser of the larger lot, who will be the lessor with relation to the purchasers of the other lots, shall make the same covenants as the owner of the leasehold property would ordinarily have entered into with sub-lessees against all loss which they might sustain by reason of the non-payment of rent or non-performance of covenants contained in the original lease. With respect to those portions which are the subject of the underleases, he, the largest purchaser, would have to covenant against losses to be sustained by non-performance in respect of the property comprised in the underlease. It is usual to introduce a clause to that effect where the property has been sold under circumstances such as those of this case. It is a matter of ordinary practice that such covenants should include the covenants contained in the original lease. But there may be in certain cases language varying this practice, and when this matter was before me in chambers it certainly appeared to me that the condition here did not adopt the form of language which is contained in the usual conditions of this nature. I still remain impressed with the notion that, in all probability, the language here used is used by mistake in copying; and I am confirmed in this, because I find that the language of the rest of the condition is right. But it appears to me that I have no right, in this stage of the proceedings, to make any declaration as to this language being used here by mistake. If you alter the words 'grantors' into 'grantees,' the language will be in unison with the ordinary form in such cases. It will be that 'the underleases are to contain all necessary covenants for indemnifying the grantees of the underleases against any loss or damage from the non-performance of the covenants or non-payment of rent in respect of any other lots than their own.' That is good sense, and in accordance with the usual form of conditions in such cases; and it is good sense with reference to the position the parties here stand in. A purchaser knows that if he purchases the largest lot he puts himself in a position to have an

assignment of the whole lease. This may be an advantage or not; but, if he is the largest purchaser, he takes it *cum onere*. The good sense of the thing is, that he puts himself in the position of the person who, being the owner, takes upon himself to grant underleases. It appears that he takes upon himself the responsibilities of the original owner. If I am to keep the word grantors, instead of grantees, the language is absurd. I am, therefore, impressed with the conviction that the word grantors stands in the place of grantees; but I am not in a position to alter them, and must hold all parties bound by them as they stand. As to the next clause, 'that if any lots remain unsold, the vendors shall stand in the place of the purchaser of the largest part in value;' it is not disputed that some lots remained unsold at the close of the auction. This clause has come into operation, and the purchaser has a right to insist upon this condition, and to say, 'I will have my lease and my covenants from the vendor. I am not to be affected by any act of the vendors by which they impose their covenants on the shoulders of any other persons. I will take my covenants from the vendors.' Mr. Smale's client [the objecting purchaser, Mr. Heath] has a perfect right to say this. Mr. Baily says his client [the purchaser to whom the assignment was made by the vendor, Mr. Woodin] will consent to re-assign, so that the vendors may give the covenants required from them. If there had never been an assignment to Mr. Woodin, the question would be what covenants has Mr. Smale's client [the objecting purchaser, Mr. Heath] a right to have? It appears to me that the vendors would have to give a covenant to Mr. Smale's client [the objecting purchaser, Mr. Heath] against the covenants in the original lease, as to all the property not comprised in his underlease, and Mr. Smale's client [the objecting purchaser, Mr. Heath] would be under no obligation to covenant, further than to keep the covenants in the original lease, so far as they affect the parts leased to him. Now, keeping the language as it now stands, the underleases are to contain all necessary covenants for indemnity from any losses arising from forfeiture in respect of all lots not their own, but it is not necessary that all should covenant for the others. I do not think that I ought to put such a construction as to say that each underlessee shall covenant with the grantor in respect of lots other than his own. If I find a condition varying from the usual form, I must put upon it such a construction as is consistent with the language, not altering it more than is necessary to work out the language. Mr. Smale's client [the objecting purchaser, Mr. Heath] has a right to say, 'I will not take a lease from Mr. Woodin [the assignee purchaser], but from the vendors;'

and, I think, he is entitled to have it from the vendors, and unless they give it, he is entitled to be discharged altogether from his contract. If Mr. Heath will say, 'I will stand in the position of the vendors,' the parties can go on upon that footing; but, if not, I must leave Mr. Smale [the objecting purchaser, Mr. Heath], to make his application to be discharged."

LEADING DOCTRINES OF THE LAW.

(Continued from p. 233).

Modes of acquiring chattels personal.—Property in chattels personal by voluntary transfer *inter vivos* is acquired, 1, by a voluntary gift; 2, by assignment for value; 3, by contract.

Voluntary gift void against creditors.—A gratuitous gift, therefore called a voluntary gift, if made by a person greatly indebted, is void as against his creditors (see 13 Eliz. c. 5; 1 Law Chron. 167—170, 192—195, 304).

Retention of possession.—Retention of possession by the voluntary grantor, and even by an assignor for value, as against assignees in bankruptcy or execution creditors, is a badge of fraud, unless the retention of possession is consistent with the apparent object of the parties (see 1 Law Chron. 407; *et infra*; Beaumont's Bills of Sale, 47).

Gift of goods requires deed or delivery.—A gift of goods—i. e., a gratuitous one, must be by deed or by actual delivery (*Irons v. Smallpiece*, 2 Barn. and Ald. 551).

Gift good against subsequent purchasers for value.—Unlike a gift of lands, a gift of goods cannot be frustrated by a simple sale for value, for the statute of 27 Eliz. c. 4, does not extend to goods, though it does to *chattels real*.

Donatio mortis causa.—This gift is by delivery in a man's last illness; the property passes not until the donor's death, but, unlike an ordinary legacy, it does not require the assent of the executor: it is liable to answer for debts.

Gift to wife.—A *donatio mortis causa* is so like a legacy, that it may be made by a man direct to his wife.

Donatio of chose in action.—A *donatio* of a chose in action may be by delivery of the instrument: the right of action remains in the representative, but for the benefit of the donee.

Assignment of goods for value.—By the common law an assignment of goods for value was good without writing.

Bill of sale.—When an assignment of goods is made by deed it is usually termed a bill of sale (1 Chron. 195, 407; *ante*, p. 185—187; Beaumont on Bills of Sale, p. 1, *et seq.*)

Registry of bill of sale.—A bill of sale of goods is required to be registered (1 Chron. 64, 136, 195, 271, 280, 407).

Bill of sale, when not act of bankruptcy.—A bill of sale *bona fide* given by a trader of the whole of his effects, to secure a present advance, is not an act of bankruptcy; otherwise, if wholly, or even partly, for an antecedent debt (1 Chron. 195; *per* Lord Denman, in *Hutton v. Crittwell*, 17 Jur. 393; 1 Ell. and Bl. 13).

Bill of sale of after-acquired goods.—Goods in existence cannot be passed by the mere words of assignment in a bill of sale, but the owner may thereby give the assignee a power to seize future property, which, when exercised, will be valid against the assignor and other persons claiming under him (*Lunn v. Thornton*, 14 Law Journ. C. P. 161; *Congreve v. Evette*, 23 Id. Ex. 277; *ante*, p. 185—188, from Beaumont on "Bills of Sale"). As to insolvency before sale, where the power is only to sell, see 1 Chron. p. 280.

Bankruptcy or insolvency.—As to the effect of bankruptcy and insolvency on a bill of sale of present chattels, and also of future-acquired chattels where there is a power to seize and not merely to sell (see 1 Law Chron. 280).

Bill of sale without possession.—Where a bill of sale is given, and there is no clause for the retention of possession by the assignor at law, the doctrine of reputed ownership in bankruptcy (1 Law Chron. pp. 63, 76, 132, 350; *Hamilton v. Bell*, 18 Jur. 1109) will, in general, apply, but according to a decision in equity, the absence of the clause is not of importance where the circumstances show that it is a security for a debt, a court of equity looking on a bill of sale as a mortgage (*Cook v. Walker*, 25 Law Tim. Rep. 51; 1 Law Chron. p. 407).

Writing required by statutes.—By the Statute of Frauds (29 Chas. 2, c. 3, explained by 9 Geo. 4, c. 14), a writing is required in several cases, and among the rest, and in particular, a contract for the sale of goods to the value of £10, if there be no earnest payment or delivery, must be in writing, signed by the party to be charged, or his agent (see *post*). So a writing is required for the grant and assignment of life annuities (vol. 1, pp. 363, 367, 368), transfer of ships (*ante*, p. 121), and assignment of patents (*ante*, p. 231).

Bills of lading.—In the case of goods sent from abroad, the transfer thereof is effected or authenticated by the transmission and mere delivery of a bill of lading—i. e., a receipt from the captain of the ship to the shipper undertaking to deliver the goods, upon payment of freight, to some person named therein or in the indorsement.

Right of action.—By 18 & 19 Vic. c. 140, the right

of action passes by the transfer of the bill of lading (*ante*, p. 122).

Evidence that goods have been shipped.—The bill of lading is conclusive evidence, in the absence of fraud, &c., of the goods having been shipped on board the vessel mentioned (*ante*, pp. 122, 123).

Property in goods conferred by one not having ownership.—*Nemo plus juris quam habet in alium transferre*, except under certain obsolete doctrines, is the maxim applicable to real estate, but as the ownership of chattels personal passes by mere delivery, there are cases in which a man may confer property in chattels of which he is not himself the owner, and of which he is not even authorised to make any disposition (2 Steph. Com. 48, 3rd edit.), as bank notes, bills, notes, &c. (being transferable by mere delivery), and goods sold in market overt.

TITLE BY CONTRACT.

Definition of contract.—This species of title to things personal has not yet been clearly defined, and a clear definition would be indeed so complicated, from the variety of forms which contracts may assume, that we think it more safe to lay at once in a compact form before our readers the elements of which it is composed. When a person voluntarily binds or engages himself to another, who assents to it, to perform, or not perform, a particular thing, for a valuable consideration, either express or implied, this agreement becomes the law of the parties, and each of them may enforce the performance thereof. From what has been said it results that a *promise* on one side, an *assent* on the other, and a *valuable consideration*, are essential elements in a contract.

Recital of existence of debt.—A recital of the existence of a debt may amount, by reference to the context, to an implied contract to pay, but does not of itself necessarily imply such a contract (*Iven v. Elwes*, 3 Drewry, 25; S. C. 1 Jur. N. S. 6; 24 Law Journ. Chanc. 249).

Promise.—A simple promise or engagement on one side, without some compensation to be reciprocally offered by the promisee, is what the civilians term a *nudum pactum*; it is not binding, however honour or conscience may plead in favour of its performance.

Forms of contracts.—Contracts are made either by deed, that is, by a written instrument sealed and delivered, or by parol, that is, without deed—the former are termed contracts by deed or *covenant*, the latter simple contracts.

Lex loci contractus.—As a general rule the *lex loci contractus* governs the construction of contracts (*Gibbs v. Freemont*, 9 Exch. 25; S. C. 17 Jur. 820; 22 Law Journ. Exch. 302).

Simple contracts, written or verbal.—All simple contracts may be written or verbal, except in the particular cases where (as before stated) the Statute of Frauds (29 Car. 2, c. 3, s. 4) requires, for the validity of the promise, some note or memorandum made in writing, and signed by the party to be charged therewith, or some other person thereto duly authorised.

Unwritten contract not avoidable; remedy only affected.—The 4th sec. does not make the agreements therein mentioned void, but only prevents their being enforced by action, if the requirements of that sec. are not complied with (*Leroux v. Brown*, 22 Law Journ. C. P. 1).

Simple contracts which must be written, and in which a simple promise is void.—The cases in which a written contract is required by the above 4th sec. of the Statute of Frauds are—

1. *Executors, &c.*—Where an executor or administrator promises to answer damages out of his own estate.

2. *Guarantees.*—Where a man undertakes to answer for the debt, default, or miscarriage of another.

3. *Marriage.*—Where any agreement is made upon consideration of marriage.

4. *Part performance—Delivery of possession.*—To a parol agreement by a father to convey property in consideration of the marriage then contemplated of his daughter, followed by delivery of possession to the husband after the marriage, the Statute of Frauds cannot be set up as a defence in equity (*Surcome v. Pinniger*, 17 Jur. 196; S. C. 22 Law Journ. Chanc. 419).

5. *Concerning lands, &c.*—Where any contract is made concerning lands, tenements, or hereditaments, or any interest therein.

6. *Not to be performed within a year.*—Where the agreement is not to be performed within a year from the making thereof.

7. *Sale of goods of value of £10.*—By sec. 17 of the Statute of Frauds, as before stated, a contract for the sale of goods of the value of £10 or upwards must be in writing, and be signed by the party chargeable, or his agent, unless there be acceptance earnest or part payment (1 Chron. 460).

8. *Delivery and acceptance of goods.*—There can be no acceptance and actual receipt of the goods within the 17th sec. unless the purchaser has an opportunity of judging whether the goods sent correspond with the order (*Hunt v. Hecht*, 8 Exch. Rep. 814; S. C. 22 Law Journ. Ex. 293; 1 Law Chron. 460).

9. *Revising barred debt, or confirming infant's promise.*—The following exception to the rule was established by the 9 Geo. 4, c. 14, namely, that no acknowledgment or promise by words only, or with-

out writing, signed by the party chargeable, shall suffice to revive a debt which would be otherwise barred by lapse of time, or to confirm one contracted during infancy.

Object of the Statute of Frauds.—Its object was to prevent the facility to frauds and the temptation to perjury held out by the enforcement of obligations depending upon the evidence of witnesses. The first section of the statute enacts, that it is "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury."

Consideration must appear by the writing.—Since the case of *Wain v. Walters* (5 East, 10), it is well established that not only the promise, but also the consideration, should appear in the written agreement; it is not, however, necessary to state the consideration expressly, but it is sufficient if it can be collected from the instrument. Thus, an offer in writing to do a certain thing conditional on the plaintiff's acceptance of the terms sufficiently shows a consideration to satisfy the 4th sec. of the Statute of Frauds (see *Powers v. Fowler*, 4 Ell. and Black. 511; 24 Law Tim. Rep. 213).

Express and implied contracts.—An express contract is, as in the contract already mentioned, when the terms of the agreement are openly uttered and avowed at the time of the making. An implied contract rests on the mere construction of the law which in certain cases casts an obligation on a person towards another, without any actual promise or engagement on the part of the obligor, as when I employ a man to transact any business for me, without any stipulation for price, the law implies that I promise to indemnify him for his labour.

Executed and executory contracts.—In executed contracts there is an immediate transfer of the possession and the right together; in executory contracts, the rights only is vested: the thing assigned from one party to the other is only in action, and the possession is not to be delivered but after the lapse of a certain time, or the deliverance depends upon a condition which is not yet realised.

Consideration.—We have seen that a promise by parol only is not binding in law unless made upon a consideration—by this term we mean the reason which moves the contracting party to enter into the contract, as some compensation afforded in return by the promisee. It may consist either of some benefit bestowed by the promisee, or some disadvantage sustained by him, and provided it is of some value, it prevents the compact from being nude.

Difference between verbal and written contracts.—There are two practical differences—

1. *As to the mode in which they are to be proved.*—It is laid down as an inflexible rule of the law of evi-

dence that, where a contract is made in writing, it shall be proved by the writing, and by that only; and that no *contemporaneous* verbal expressions shall be engrafted upon it for the purpose of altering it (Phillips, Part 2, c. 5).

2. *Patent and latent ambiguities.*—In a written contract, if there be a *patent* ambiguity, or one appearing on the face of the instrument itself, it never is allowed to be explained by verbal evidence. A *latent* ambiguity is when the instrument is on the face of it intelligible enough, but it is doubtful how to ascertain the identity of the subject-matter to which it applies; as if a devise were to John Styles, without further description, here the instrument is intelligible on the face of it. But as there may be several claimants of this same name, evidence is allowed to show to whom it applies.

The consideration of contract by deed.—One of the chief distinctions between a contract by deed and a simple contract is that the *latter* requires a *consideration* to support it, the former not; and this last proposition must be understood where the interests of third parties are not affected.

Bills of exchange are exceptions to the rule.—There is one class of cases which forms a species of exception to the rule, that a consideration is required to give validity to a simple contract; it is the case of a negotiable security, a bill of exchange, or promissory note, these are always presumed to have been given for a sufficient consideration until the contrary is shown.

Construction—Effectuating and not defeating the intention of the parties.—In construing a written contract, the court will, if possible, so read it as to effectuate the intention of the parties, rather than defeat it. The construction of a written contract must be governed by the intention of the parties as indicated by the terms of the instrument itself, even although, if so construed, the effect will be that it must be declared void by statute (Stratton v. Pettit, 16 Com. Ben. Rep. 420; S. C. 1 Jur. N. S. 662; 24 Law Journ. C. P. 182).

Written contract not affected by a verbal provision not inserted therein.—Where persons sign a written agreement and there has been no fraud or mistake, the written agreement binds at law and in equity according to its terms, although verbally a provision was agreed to, which has not been inserted in the document; subject, however, to this that the defendant in equity may call upon the court to be neutral unless the plaintiff will consent to the omitted term (Martin v. Pycroft, 2 De Gex M. and G. 785; S. C. 16 Jur. 1125; 22 Law Journ. Chanc. 94).

Avoided by false and fraudulent representation.—A contract may be avoided by a false and fraudulent representation, though not relating directly to the

nature or character of its subject matter, if it is so closely connected with the contract as that the party sued upon it would not, but for the misrepresentation, have entered into it, and was induced to enter into it, to the knowledge of the other party, by such misrepresentation (Canham v. Barry, 16 Com. B. R. 597; S. C. 1 Jur. N. S. 402; 24 Law Journ. C. P. 100).

Fraud only vitiates contract; does not revest estate.

—Fraud only gives a right to avoid a contract or purchase: the property vests until avoided, and all the mesne dispositions to persons not parties to, or at least not cognizant of, the fraud, are valid (Stevenson v. Newnham, 17 Jur. 600; S. C. 22 Law Journ. C. P. 110).

Contracts by lunatics and infants.—The contracts of lunatics and infants for necessities are binding (1 Law Chron. 244, 308).

Confirmation by infant.—The contract of an infant, even if not for necessities, if confirmed after attaining majority, is binding (see Latt v. Booth, 3 Car. and K. 292). It must be in writing (1 Law Chron. 308; Mawson v. Blane, 23 Law Journ. Ex. 343).

Drunkard's contract.—A person contracting whilst totally drunk is not bound thereby.

Feme covert.—Neither husband nor wife is bound by her contract, without authority, but her separate estate may, in equity, be bound thereby (1 Law Chron. 200).

Presumed that money borrowed is the husband's debt.—Money borrowed by husband and wife will, in the absence of evidence, be presumed to be a debt of the husband; but this presumption does not exclude evidence (Thomas v. Thomas, 1 Jur. N. S. 1160).

Wife's contracts for necessities—Authority of wife to be shown.—In an action for the price of goods supplied to a married woman, the proper question to leave to the jury is, not simply whether the goods were necessities suitable to the station in life of the party, but whether, upon the facts proved, the wife had authority, express or implied, to bind her husband by her contracts (Read v. Teakle, 13 Com. Ben. Rep. 627; S. C. 17 Jur. 841; 22 Law Journ. C. P. 161; Reneaux v. Teakle, 8 Exch. 680; 17 Jur. 351; 22 Law Journ. Ex. 241).

Illegal and impossible contracts.—A contract to do an act which is then, or afterwards, becomes illegal, is not enforceable, but it is otherwise if merely impossible, not being by the act of the other party (1 Law Chron. 241; see Pope v. Bavage, 10 Exch. Rep. 73).

However, where the law casts the duty on a man which, without fault on his part, he is unable to perform, the law will excuse him for non-performance (Clark v. Glasgow Assoc. Co., 1 Macq. Ho. L. Cas. 668).

Illegality—Tending to unlawfulness—Prejudicial to public good—Public policy.—Contracts are illegal from their tendency to promote unlawful acts, without regard to any circumstances which go to affect the probability of the unlawful act being done. The law will not uphold contracts which have a tendency prejudicial to the public good, and this rule as to public policy is not too vague to be given practical effect to (*Egerton v. Brownlow*, 18 Jur. 71; S. C. 23 Law Journ. Ch. 348; 4 Ho. Lords Cas. 1).

PRINCIPAL AND AGENT.

When deed or not to constitute principal and agent.—A corporation aggregate should appoint an agent by deed, and where the authority is to execute a deed it should be by deed (1 Law Chron. 215).

Determination and revocation of agency.—An agency is determined by the death of the principal, and may always be revoked, except where given in pursuance of a contract with another party, and by way of security.

Difference between powers of general and special agent.—A general agent is presumed to have authority for what he does, but the power of a special agent is strictly bounded by the authority he has actually received (1 Law Chron. 215).

Ratification of agent's act where beyond powers.—A ratification by a principal of an agent's act beyond the scope of his authority has a retrospective effect (1 Law Chron. 215).

Contract by agent that of principal.—A contract by an agent having authority is in law the contract of the principal, both to entitle the latter to sue and to render him liable to be sued thereon (1 Law Chron. 60, 215).

A principal may sue on a contract entered into by his agent in his, the agent's, own name, though such contract is in part to be performed by the agent personally (*Phelps v. Prothero*, 16 Com. B. R. 370; S. C. 1 Jur. N. S. 1170; 24 Law Journ. C. P. 225).

Payment by principal to his own agent not payment to the party with whom he has dealt.—Where a principal authorises his agent to pledge his credit, and the latter makes a purchase on his behalf, and thereby creates a debt, the principal is not discharged by payment to the agent if the money is not paid over to the seller, unless the latter, by his conduct, makes it unjust that the principal should be sued; as, for example, where the seller, by his words or conduct, induces the principal to believe that a settlement has been come to between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent (*Heald v. Kentworthy or Kenworthy*, 10 Exch. 739; S. C. 1 Jur. N. S. 70; 24 Law Journ. Exch. 76).

In other words, when a man purchases goods

through the medium of an agent, being ignorant that he is dealing with an agent, the seller is not precluded from afterwards suing the principal, unless he has by words or conduct induced him to alter his condition (*Ibid*).

Agency not disclosed.—Where the agent does no contract as agent, he or his principal may be sued at the election of the other party (1 Law Chron. 219–222, 394).

Delegation of authority.—*Delegatus non potest delegare*: therefore an agent cannot, without special authority, delegate his powers (1 Law Chron. 217).

Agent buying or selling his own or principal's goods.—An agent employed to purchase cannot buy his own goods for his principal, neither can an agent employed to sell purchase for himself his principal's goods. Principals may either repudiate such transactions altogether, or adopt and take the benefit of them (*Bentley v. Craven*, 18 Beav. 75).

Contract of sale—Property passing.—A contract for sale implies a mutual bargain: on the one hand to part with the goods, and on the other hand to pay for them: if the contract be for ready money, no property passes till payment, or at least, tender or part payment, or delivery and acceptance; if on credit, the property, if specific and capable of delivery, passes on the making of the contract, provided in cases within the Statute of Frauds there be a writing, &c.

Stoppage in transitu.—If a purchaser become insolvent before the goods reach him (not having paid for same), the vendor may stop them in their passage: this is called stoppage *in transitu*; this cannot be done as against the indorsee for value of the bill of lading.

Sales in market overt.—Sales and contracts of things vendible in open market (including in London ordinary shops), except in the case of the King, or stealing or obtaining by false pretences, followed by a conviction, are invalid against persons claiming any right thereto; but not if the sale was out of market overt.

Warranty of vendor's title to goods.—There is no implied warranty of title on the sale of goods, but if the title prove bad, the vendor may be compelled to repay the purchase money on the ground of a failure of consideration (1 Law Chron. 15, 418).

Soundness or fitness of goods.—There is no implied warranty of soundness; *caveat emptor* is the rule, except in the case of a sale of goods of a particular denomination, which the purchaser cannot inspect, or of a manufactured commodity bought for a known purpose, whether inspected or not.

Vendor of bill of exchange—Warranty.—A vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness, and if it turns out that one of the names is forged, and the bill becomes

valueless, he is liable to the vendee as upon a failure of consideration (*Gurney v. Womersley*, 4 Ell. and Bl. 139; S. C. 1 Jur. N. S. 328; 24 Law Journ. Q. B. 46).

Words of warranty.—No particular words are required to make a warranty: a mere representation (not being a mere commendation of the goods) may amount to a warranty.

Factors.—Factors are agents entrusted with the possession of goods, and authorised to sell in their own names, as the apparent owners. Where they sell on a *del credere* commission they are responsible for the price of the goods sold, otherwise not (1 Law Chron. 268, 279).

Del credere contract—writing.—An agreement by a factor to sell upon a *del credere* commission need not be in writing, not being a promise to answer for the debt, default, or miscarriage of another person within sec. 4 of the Statute of Frauds (*Couturier v. Hastie*, 8 Exch. Rep. 40; S. C. 22 Law Journ. Ex. 97).

Advances by factor—Personal remedy and lien.—Where a factor makes advances he has a personal remedy against the principal as well as a lien on the fund; and this is the same whether the factor has or has not a *del credere* commission, except that when the factor, having a *del credere* commission, has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted to the principal by the guarantee arising out of the commission (*Graham v. Ackroyd*, 10 Hare, 192; S. C. 17 Jur. 657; 22 Law Journ. Ch. 1046).

Brokers are agents not having possession of the goods and acting ostensibly as agents and not being responsible for the price of goods sold.

London.—Brokers in London are required to be licensed; but an unlicensed broker is not prevented from recovering money paid at the request of his employer, or for money due on accounts stated with his employer (*Jessopp v. Lutwyche* 10 Exch. R. 614; 24 Law Journ. Exch. 65).

Advances, &c. to brokers or factors, &c., entrusted with the goods on which they have obtained advances, without knowledge of their agency character, are effectual against the real owner of the goods. Sales of goods by a person entrusted with a bill of lading, &c. are, in similar circumstances, also effectual.

Payments to agents entrusted with goods, are effectual though the party purchasing from, and paying them, had notice of the agency, the same being *bond fide*.

Pledge by agent of goods entrusted to him, by way of security for advances, are valid against the real owner though the pledgee had notice of the agency, but not that he had no authority so to pledge or is acting *malâ fide*.

To deprive the pledgee of the protection of the above provision, he must be fixed with knowledge, that the agent is acting *malâ fide*, and beyond his authority, and no mere suspicion will amount to notice; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them (*Navielshaw v. Brownrigg*, 2 De Gex, M. and G. 441; S. C. 16 Jur. 799; 21 Law Journ. Ch. 908).

THE BANKRUPTCY LAW.

(continued from p. 265)

Property vesting in assignees [continued]—Reputed ownership—Powers—Conveyances, bankrupt joining in—Redemption by assignees of bankrupt's mortgaged property—Bankrupt's leases, conveyances and agreements, &c., delivered up with possession of the lands.

It will be necessary before concluding the statement of what property vests in the assignees, to notice some particular cases, especially those depending on reputed ownership and the leases and contracts of the bankrupt.

REPUTED OWNERSHIP.

Under the doctrine of reputed ownership, as declared by the previous acts and the Consolidation Act, s. 125, the property of third persons in the possession of the bankrupt at the time of his bankruptcy, may be claimed by his assignees—a statutable title to other persons' property being given to them for the benefit of the bankrupt's creditors.

Sec. 125. *Goods in the possession, order, or disposition of the bankrupt to be deemed his property—Proviso against assignment of vessels.*—By sec. 125 of the Consolidation Act, it is enacted, "that if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy: provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an act made in the Parliament holden in the eighth and ninth years of the reign of her Majesty, intituled 'An act for the registering of British Vessels,' or any of the acts therein mentioned."

The cases relating to reputed ownership are very numerous and frequently complicated in their circum-

stances, and it will suffice to point out the chief distinctions arising thereout. It may be observed that the leading principles as to reputed ownership are clear, although their application is often difficult, and the doctrine is certainly not likely to be extended by the courts beyond the fair limits of the present decisions (see *Belcher v. Bellamy* 2 Exch. 306). The true owner means the person who has the legal right to the possession and the power of dealing with the property; and as to the general doctrine, the following exposition by Lord Redesdale in *Joy v. Campbell* (1 Sch. and Lef. 336), has been fully approved of in the courts (see per Parke, B., *Whitfield v. Brand*, 16 M. and W. 286). "The statute refers to chattels, where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, who ought not to have them, but whom the owner permits unconscientiously as the act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of property to which he was not entitled; but in the construction of the act, the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another, *with consent of the true owner*. There must, therefore, be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership as such." Therefore, goods obtained by fraud by the trader, by a pretended purchase without any intention of payment, were held not to pass (*Load v. Green*, 15 M. and W. 216). The bankrupt was the real owner, subject to the right of the vendor to annul the contract for the fraud. So where a trustee was induced by a person, who afterwards became bankrupt, to assign to him a house and furniture settled on his wife and child by a former husband, by a deed containing false recitals and in breach of trust, it was held, that the furniture was not in the bankrupt's order and disposition (*ex parte Horwood*, Mont. and M. 169). In order that goods may be held to pass to assignees as being in the possession, &c. of the bankrupt, two things are required—first, they must be in his possession under such circumstances as to render him reputed owner of the goods; secondly, they must have been left in his possession through some impropriety or laches of the true owner, under circumstances calculated to enable the bankrupt to obtain a false credit by inducing the world to look on him as the true owner (in accordance with the judgment of Lord Redesdale in *Joy v. Campbell*, 1 Sch. and Lef. 328). The question whether goods are in the possession, order, and disposition of a bankrupt may depend on the usage of some particular trade, which may vary at different times and places. When property is

left by the true owner in a shop where goods are notoriously left by parties for other purposes than for sale (as clocks with a clockmaker), the proprietor of the shop is not a reputed owner of them within the statute (*Hamilton v. Bell*, 18 Jur. 1109).

Personal chattels and fixtures.—The provision of the act as to reputed ownership, extends to personal chattels only (including, however, choses in action), and does not include real property, or even terms for years (*Roe v. Galliers*, 2 Term Rep. 133; *Ryall v. Rolle*, 7 *Id.* 234). And fixtures do not pass to the assignees under the reputed ownership doctrine, whether they be such as would be removeable between landlord and tenant, or such as would not be removeable (see *Minshall v. Lloyd*, 2 Mees. and W. 459; 1 Mont. D. and L. 631; but see *Trappes v. Hunter*, 2 Cr. and Mees. 153; explained in *Exp. Barclay*, 5 De Gex, Mac. and G. 403; S. C. 1 Jur. N. S. 1146). In the last case a lessee of a public house made an equitable mortgage of the house, which carried with it the fixtures, removeable by the lessee, as between him and his landlord. The lessee remained in the possession of the house and fixtures, and became bankrupt. It was held, reversing the decision of the commissioner, that the fixtures did not pass to the assignees as being in the order and disposition of the bankrupt, but belonged to the mortgagees. If the mortgage deed had not expressly or impliedly included the fixtures, they would have belonged to the assignees, not, indeed, under the order and disposition clause of the statute, but because they remained the property of the bankrupt (see also *exp. Langton*, re *Clarkson*, 1 Law Chron. p. 132).

Possession with authority.—The provision of the above section of the Consolidation Act, as to reputed ownership, does not apply where the bankrupt is in possession, *in autre droit*, as trustee, executor, factor, broker, &c.; nor where the property was placed in the bankrupt's hands for a specific purpose, or it was obtained by fraud, or is in the possession of the bankrupt, in conformity with the known usages of trade, as of a bookseller, selling on commission, or of a clock maker, having clocks for repairing or cleaning (*Whitfield v. Brand*, 16 Mees. and W. 212; *Hamilton v. Bell*, 1 Law Chron. 350; 10 Exch. Rep. 545, 18 Jur. 1109; 24 Law Journ. Exch. 45). In such cases the bankrupt has not the right to deal with the property as owner. And the proceeds of the goods if sold, so long as they can be identified, would belong to the principals (*Taylor v. Plumer*, 3 Mau. and S. 562); and so if not received at the time of the bankruptcy (*Scott v. Surman*, Willes, 400). So where B. assigned his furniture in contemplation of marriage to trustees, to stand possessed of it in trust for the sole and separate use

of his wife, during the joint lives of himself and her, and the furniture was in the house where he resided at the time of the bankruptcy, it was held not to be in his reputed possession, because the possession had been according to the deed and consistent with it (*Simmons v. Edwards*, 16 M. and W. 898). The decision of Vice Chancellor Knight Bruce, in *Exparte Castle*, was cited to bring the case within the section. There a father, by deed, assigned to his son, in consideration of natural love and affection, certain pictures and effects; upon trust to permit the father to have the present use and enjoyment of them during his life, and subject thereto to the proper use and benefit of the son. Formal possession was delivered to the son upon the execution of the deed, by the delivery of one picture in the name of the whole, but the father remained in possession until his bankruptcy. It was held, that the assignees were entitled to the goods, as the father was the reputed absolute owner, and had the ordering and disposition of the goods immediately before and at the time of the bankruptcy, and as the son had not given notice of the change of title effected by the deed, the consent of the son was to be inferred (*Exparte Castle*, 3 M., D. and D. 117). The distinction between the two is perhaps that in the former case the possession was qualified by the rights of others besides the real and alleged apparent owners, and a trust created which equity would have enforced, whereas in the latter it was a mere voluntary deed which was void as against creditors under the statute of Elizabeth. It was not intended to lay down broadly that a possession consistent with a contract was sufficient, for this would protect many of the very transactions against which the section is directed, as where the goods are leased to the trader under such circumstances as to make him the apparent owner (*Horn v. Baker*, 9 East, 215; *Load v. Green*, 15 M. and W. 228).

Choses in action—Notice of assignment.—It has been already observed that choses in action are within the reputed ownership doctrine, and this is so though they have been assigned to a third person unless and until notice is given to the person from whom the payment is to be received, for until then he would hold the debt at the order and disposition of the trader, and be released by payment to him (*Buck v. Lee*, 1 Ad. and El. 806; *Gardner v. Lachlan*, 4 Myl. and Cr. 129). That which is equivalent to delivery of moveable goods must be done where practicable, as the delivery of a bond or other security (*Jones v. Gibbons*, 9 Ves. 410), but such delivery will not dispense with notice (*Exparte Monro*, 1 Buck. 300). No notice is however requisite as to bills of exchange or other negotiable instruments, or documents passing by

delivery, such as dock warrants (*Exparte Price*, 3 M., D. and D. 586; *Exparte Davenport*, 1 Deac. and Ch. 397). Notice of the deposit of a warrant of attorney, though given to secure the payment of bills of exchange, is requisite (*Exparte Price*, ib.). Notice of the assignment of debts by a retiring to a continuing partner must be given, and a notice in the *Gazette* is not sufficient unless it can reasonably be inferred that the debtor had seen it, as by proving that he has been in the habit of taking in the *Gazette* or other newspaper, or has attended a reading room where it was taken in, or has shewn unusual interest in the affairs of the partnership, or the like (see *Tayl. on Evid.* 1092; *Exparte Osborne*, 1 Gl. and J. 356; 1 J. N. S. Dig. 17). In a very recent case, a dissolution of partnership was advertised in the *Gazette*, and a circular sent to the creditors in the name of the dissolved firm, requesting debtors to the firm, to pay their debts to one partner. It was held, that the notice was not sufficient to take the debts out of the reputed ownership of the firm (*Exparte Sprague*, 4 De Gex M. and G. 866; S. C. 22 Law Journ. Bank. 62). The real point in each case is whether in point of fact, a notice of the assignment of the chose in action has been communicated, and it is not necessary to prove a formal notice, the sufficiency of the notice is a question of fact, upon the circumstances of each case. In *Tibbets v. George* (3 Adol. and Ell. 107), the knowledge of the solicitor to the assignees under a commission, without any express communication to the assignees, was held to be the knowledge of the assignees sufficient to take a debt out of the reputed possession of an insolvent who had assigned his claim under the commission (see also *Exparte Smyth*, 3 M., D. and D. 687). So where the mortgagee is himself the person to whom notice should be given, the transaction itself is sufficient notice (*Smith v. Smith*, 2 C. and M. 231; *Exparte Smart*, 2 Mont. and A. 69). Notice of the assignment or mortgage of a policy of assurance must be given to the office, but the sufficiency of the notice is a question of fact upon the circumstances in each case (*Edwards v. Scott*, 1 M. and Gr. 962; re *Pearce*, 1 Jur. N. S. 385). A letter to the secretary of an insurance office, saying, "I am holder of the undermentioned policies," stating the particulars of them, and inquiring what sum the office would give for them, has been held sufficient notice (*Exparte Stright*, Mont. 502). The rule as to notice is the same where a mortgagee or assignee of a policy, sub-mortgages it (see *exparte Wood*, 3 Mont. D. and D. 315; *exparte Arkwright*, ib. 129), but in such case notice to the original owner is unnecessary (*exparte Barnet*, 1 De Gex, 194). It seems now to be settled, that the same

principles as to notice apply to policies in a mutual assurance society, such as the Equitable (*ex parte* Arkwright, 3 M., D. and D. 129; *Thompson v. Spiers*, 13 Sim. 469), and that the knowledge of the assignee, although a partner, is insufficient. The principle which would probably now be adopted, is that it must be such notice as would make it morally impossible for the assignor to have dominion of the policy without the assent of the assignee (*Thompson v. Spiers*, 13 Sim. 478). Where an attorney, who was also agent for the company, and authorised to receive notices of assignments, arranged the assignment of a policy, his knowledge was held to be notice to the company (*Gale v. Lewis*, 9 Q. B. 780). But the mere payment of the premiums by the assignee is not sufficient notice (*Burridge v. Row*, 1 Y. and C. 183), nor an agent mentioning the assignment in a conversation with the clerk of the office when paying the premium (*ex parte* Curtis, 4 Dea. and C. 354); and where the same person is secretary to two companies, it would not be safe to rely upon notice to him as secretary to one company being notice to the other (*ex parte* Bignold, 3 Dea. 151). The private knowledge of a director or actuary of the company would not operate as notice (*ex parte* Watkins, 2 Mont. and A. 848; *ex parte* Bignold, 3 Mont. and A. 477). Shares in a public company, until transferred in the manner prescribed by the act of Parliament, will in general pass to the assignees, either as not having ceased to belong to the bankrupt (see *Bosanquet v. Shortridge*, 4 Exch. 699; see, however, S. C. 16 Jur. 919), or as in his order and disposition (*ex parte* Lancaster Canal Company, 1 Dea. and C. 411). Notice given after the act of bankruptcy and before the petition for adjudication would suffice (*ex parte* Dobson, 2 M., D. and D. 685).

Putting an end to the possession of the bankrupt—The bankrupt must at the time of his bankruptcy have possession of the goods, with the consent of the true owner, and, therefore, if the latter have taken steps to obtain possession of the goods they will not be in the reputed ownership of the bankrupt. Thus where a chariot had been built by the order of a customer, and paid for, but was left at the coachmaker's for some additions, which not being done, the customer sent for it repeatedly, and the maker promised to deliver it: the customer, being dissatisfied, ordered it to be sold, and it remained for that purpose at the maker's until he became a bankrupt; it was held not to be in his order, &c., without consent of the true owner. (*Carruthers v. Payne*, 5 Bing. 270). So where a merchant abroad employed an agent in England to sell wines on commission, who sold in his own name, and the merchant required him to deliver up the

wines, which he neglected to do, and afterwards became bankrupt while some of the wines were in the dock in the agent's name, and others mixed with his stock; it was held that they were not within this section (*ex parte* Moldaut, 3 Dea. and Ch. 351; *Smith v. Topping*, 5 B. and Ad. 674). Where the bankrupt was in possession of a factory, steam-engine, and fixtures under a contract for the purchase of them, and the day before he committed an act of bankruptcy he requested the vendor to re-sell and pay himself, and the vendor accordingly retook possession, and the man then in charge for the bankrupt agreed to continue the charge of the property for the vendor; the steam-engines and fixtures were held not to be in the order and disposition of the bankrupt (*ex parte* Watkins, 1 Dea. 296; see also *Price v. Groom*, 2 Exch. 538; 17 L. J. 846, Exch.). And a mortgagor in possession cannot, by leasing goods to another, render them liable to be taken by the assignees of the latter (*Frazer v. Swansea Canal Company*, 1 Ad. and E. 354). So the delivery of a bill of lading of goods at sea is a sufficient transfer (*Lempriere v. Paaley*, 2 T. R. 485, or of a bill of sale of a ship if duly registered. Goods in a bonded warehouse sold and paid for, and marked by the purchaser, but for the delivery of which an order from the vendor was still requisite, passed to the assignees of the vendors (*Knowles v. Horsfall*, 5 B. and Ald. 134). So also where some of the goods remained in the vendor's own vaults (*Id.* see, however, *ex parte* Dovor, 2 M., D. and D. 259, in which case, however, the decision might have been supported on the ground that the real owner had demanded the possession of the goods). But goods sold to a bankrupt, and afterwards stopped *in transitu*, are not within the section (*Townley v. Crump*, 4 A. and E. 58). Goods sent on sale or return are (*Livesay v. Rood*, 2 Campb. 83). Where a ship is being built for a person under a contract for payment by instalments, so that each portion becomes his property, it does not pass to the assignees of the builder becoming bankrupt before its completion (*Clark v. Spence*, 4 Ad. and E. 448).

Partners.—Where two or more persons are joint owners of property, and one of them becomes bankrupt, the joint property in his possession is not within the clause of reputed ownership. But where there is a dormant partner, all the property and effects, and the debts due to the concern, will be held to be in the order and disposition of the ostensible partners (*ex parte* Enderby, 2 B. and C. 389). So also where a retiring partner allows the continuing partner to remain in possession although under a lease (*Horn v. Baker*, 9 East 215). A dissolution of partnership was advertised in the Gazette, and a circular sent to the creditors in the name of the

dissolved firm, requesting debtors to the firm to pay their debts to one partner and the plant and stock were taken possession of by the same partner, and used in his separate trade after the dissolution; it was held that the same were in his separate reputed ownership (exp. Sprague, 4 De Gex M. and Gord. 866; S. C. 22 Law Journ. Bankr. 62). Where the property of one partner is in the possession of the firm, as furniture in the house where the business of the firm is carried on, it will pass to the assignees of the firm (exp. Hare 1 Dea. 16). But where S. and O. assigned all their stock and effects to trustees for the benefit of their creditors, and dissolved their partnership, and S. continued on the same premises, but carried on a different branch of trade, and soon afterwards took in U. as a partner; and it appeared that part of the stock of the former partnership of S. and O. was a quantity of New Zealand flour, which remained unsold upon the premises, but was separately warehoused and kept distinct from the stock of the new partnership, and was not adapted for the new manufacture carried on by S. and U., and a separate fiat was sued out against U., and six months afterwards a joint fiat against S. and O.: it was held that the trustees were entitled to the flour, and that the clause of order or disposition did not apply to such a state of circumstances (exparte Vardon, 2 M., D. and D. 694). Two partners traded under the name of one of them only, and upon a dissolution the one continued the business, the other retiring, but no apparent change took place in the firm; by the agreement on the dissolution, the stock in trade belonged to the continuing partner, who afterwards became bankrupt. The stock in trade was held not to be in the reputed ownership of the two, but to be administered as the separate estate of the continuing partner (exp. Wood, 1 De Gex, 134).

POWERS, EXECUTING.

The assignees are enabled to execute powers previously vested in the bankrupt for his own benefit (not being in respect of an ecclesiastical vacant benefice). This is by sec. 147 of the Consolidation Act, which enacts "That all powers vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees, for the benefit of the creditors, in such manner as the bankrupt might have executed the same." A bond to the crown under the 33 Hen. 8, c. 29, binds all the lands of the obligor over which he has a disposing power at the time he executed it, and neither he nor his assignees could defeat the right of the crown by a subsequent exercise of the power (Ellis v. Reg., 5 Exch. 921).

JOINING IN CONVEYANCES.

The commissioner may order the bankrupt to join in conveyances to purchasers of his estate. This is by sec. 148, which enacts "that it shall be lawful for the court, upon the application of the assignees, or of any purchasers from them of any part of the bankrupt's estate, if such bankrupt shall not try the validity of the adjudication, or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in any conveyance of such estate or any part thereof; and if he shall not execute such conveyance within the time directed by the order, such bankrupt, and all persons claiming under him, shall be stopped from objecting to the validity of such conveyance; and all estate, right, or title which such bankrupt had therein shall be as effectually barred by such order as if such conveyances had been executed by him." The order will be made of course unless he disputes the validity of the adjudication (exp. Bradstock, 1 M., D. and D. 118).

MORTGAGES OF BANKRUPT'S ESTATE.

The assignees are empowered to tender the mortgage money due on any mortgage by the bankrupt, even before the time appointed for the payment of such money has arrived (Dunn v. Massey, 6 Adol. and El. 479). This is by sec. 149 of the Consolidation Act, which provides, "That if any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, pledge, or deposit being upon condition or power of redemption at a future day by payment of money or otherwise, the assignees may, before the time of the performance of such condition, make tender or payment of money or other performance, according to such condition, as fully as the bankrupt might have done; and after such tender, payment or performance such real or personal estate may be sold and disposed of for the benefit of the creditors." This section extends both to legal and equitable mortgages. The assignees have also the same right of redemption as the bankrupt. It would probably now be held that a mortgagee before an act of bankruptcy is entitled to tack advances made after an act of bankruptcy without notice (see cases, Sugden's Vendors and Purchasers, 1049—1151). The 1 & 2 Vic. c. 110, s. 13, by which judgment debts are made an actual charge on the estate, provides that such charge shall not operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom such judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy.

BANKRUPT'S LEASES.

Vesting in assignees—Not by appointment.—This will be a convenient place to notice the subject of the leasehold interests of a bankrupt. These, as before stated, do not vest in the assignees by their mere appointment; at least, not if the assignees are unwilling to accept same. The correct statement respecting this is as follows: the lease of a bankrupt does not vest in the assignees absolutely (i. e., not so as to render them liable for the rent or on the covenants) by virtue of their appointment, but they have a discretion to accept or reject same. And the lease does not, notwithstanding the language of sect. 40 of the Consolidation Act (viz. that until the creditors' assignees are chosen the official assignee shall be deemed to be the sole assignee of the bankrupt's estate and effects) vest absolutely in the official assignee prior to the appointment of creditors' assignee and their acceptance of lease (See *Turner v. Nicholls*, 18 Jur. 298; *Princ. Com. Law*, 108, 110; see as to election to take part and reject other part, *Graham v. Allsopp*, 8 Exch. Rep 186).

Assignees being required to accept or reject land of bankrupt under a conveyance in fee, or under an agreement therefor, subject to perpetual rent, or lease, or agreement.—By sec. 145 of the Consolidation Act a bankrupt is not to be liable to rents or covenants in conveyances on perpetual rent, or leases, or agreements; and if the assignees decline to determine whether they will accept the conveyance, lease, or agreement, any person entitled to the rent, &c., may apply to the commissioner for the delivery up of such conveyance, lease, or agreement, and the possession of the premises. The following is the enactment in full: "That if the assignees of the estate and effects of any bankrupt having or being entitled to any land either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements, in any such conveyance or agreement, or lease or agreement for a lease; and if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for a lease, the bankrupt shall not be liable if, within fourteen days after he shall have had notice that

the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such land or conveyance or agreement for conveyance, or such lease or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the court, and the court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit."

Liability of assignees for rent.—The assignees are not liable for rent of premises held by the bankrupt where they have not accepted the lease. The landlord, however, may distrain the goods on the premises (*Gethin v. Wilks*, 2 Dowl. 189; 1 Mont. and Ayr. Bankr. 281, 2nd edit.). By electing to take the premises the assignees make themselves liable to the covenants, and among those, that, of course, for payment of rent, until they part with the lease by assigning it over, which they may do even to a pauper (1 Barn. and Ald. 36; 1 Merivale, 253; 2 Madd. 330; 1 Mont. and Ayr. Rep. 94; *Princ. Com. L.* 108, 110). If the assignees accept a lease of the bankrupt, the latter is released from the covenants therein. And if the assignees do not accept, still the bankrupt would not be liable if within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up the lease to the owner or person then entitled to the rent (12 & 13 Vict. c. 106, s. 145). When a lessee becomes bankrupt, a covenant by him not to assign without the lessor's consent, will not be binding on the bankrupt's assignees even if they accept the lease. And even if the bankrupt should himself take from his assignees, he would not be prevented from subsequently assigning over (*Paull v. Nurse*, 8 Barn. and Cres. 486; *Princ. Com. L.* 110; 8 Term Rep. 57).

Election by assignees.—There have been many cases on the question as to what acts by the assignees amount to an acceptance by them of the bankrupt's leases. It has been held that the assignees have a right to do reasonable acts for ascertaining the value of the lease, for they are not bound to take any interest of the bankrupt which is not beneficial (*Hope v. Booth*, 1 B. and Ad. 505), as, for instance, merely advertising the lease without stating themselves to be owners, and putting the premises up to sale without any bidding being offered, is not an

election (*Turner v. Richardson*, 7 East, 335), nor allowing the effects of the bankrupt to remain on the premises for nearly a year after the bankruptcy and paying the rent due to prevent a distress, giving notice at the same time to the landlord of their intention not to take the lease unless it could be advantageously disposed of (*Wheeler v. Bramah*, 4 Campb. 368). But a deliberate taking possession by the assignees will be an election to be tenants, although the bankrupt's effects remain on the premises, and after they are sold the keys are given up to the landlord (*Hanson v. Stevenson*, 1 B. and Adol. 308). So where they assume the management of the farm (*Thomas v. Pemberton*, 7 Taunt. 206), or enter the premises to complete contracts entered into by the bankrupt (*Ansell v. Robson*, 2 C. and J. 610; *Clarke v. Hume*, 1 Ry. and M. 207). So where a bankrupt had a lease of the premises and a reversionary interest, the sale of his estates and reversionary interest by the assignees amounted to an election (*Page v. Godden*, 2 Stark. 309). By their refusal to elect, the term may be determined, and they will have the same rights as to the offgoing crop, &c., as the lessee would have had under the conditions of the lease (*ex parte Maundrell*, 2 Madd. 315). But as they are discharged of the covenants, they have no rights which depend upon a mutual covenant, and cannot sue the lessor upon a covenant to re-purchase the fixtures at an appraisalment to be made by two persons, one to be named by the lessor and one by the lessees (*Kearsey v. Carstairs*, 2 B. and Ad. 716).

Agreement for sale—Assignees electing to accept.—Somewhat similarly to the case of a lease is the case of an agreement entered into by the bankrupt for the purchase of land; by sec. 146 of the Consolidation Act, the vendor of the estate may compel the assignees to elect whether they will abide by or decline the agreement for such sale. The enactment is that if any bankrupt shall have entered into an agreement for the purchase of any estate or interest in land, the vendor, or any person claiming under him, if the assignees shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, may apply to the court, who may thereupon order the assignees to deliver up the agreement and the possession of the premises to the vendor, or person claiming under him, or may make such order therein as such court may think fit (*Mont. and Ayr. Pr. c. 15*; see sec. 145, set out before, as to conveyance or agreement for conveyance in fee, subject to a perpetual yearly rent).

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ANNUITY.—*Six years' arrears—Secured by demise—Statute of Limitation.*—The grantee of an annuity secured by a demise for a term of years in land, with a power of sale, is not restricted by the 3 & 4 Will. 4, c. 27, s. 42, from obtaining by a sale of the term more than six years' arrears of the annuity. An annuity was secured by a reversionary term, with a power of sale, either before or after the term might fall into possession. While the term was still reversionary, the plaintiff filed a bill for a sale: Held, that he could recover more than six years' arrears of the annuity. *Snow v. Booth*, 2 Jur. N. S. 244; Week. Rep. 1855-6, p. 345; 27 Law Tim. Rep. 7.

ASSIGNMENT.—*Defective notice—Priority.*—Notice of a deed, accompanied by an erroneous statement of its contents, is not necessarily a sufficient notice. A. having a contingent reversionary interest in a fund invested in the names of trustees, assigned by deed to B. "so much of his shares as would amount to £923," and by the same deed covenanted to insure his life against that of the life-tenant, and charged the premiums on his share. The purchaser gave notice to the trustees, that by the deed in question so much of the share as would amount to £923 had been assigned to him, but the notice was silent as to the insurance: Held, that B. took priority over subsequent incumbrances on the share as to the £923 only, and not as to a further sum paid by him as premiums on the policy. *Re Bright's Trusts*, Week. Rep. 1855-6, p. 381.

BOND DEBT.—*Statute of Limitation—3 & 4 Wm. 4, c. 27—3 & 4 Wm. 4, c. 42—Part payment, &c.—Acknowledgment, by whom given, and against whom effectual.*—No person can make a promise which will bind any one but himself, or those for whom he is agent. The right to sue upon a bond more than twenty years old depends upon the 3 & 4 Will. 4, c. 42, s. 5, which plainly does not contemplate a new promise. Under the old law, an action upon a bond might be brought at any time, subject to the plea of *solvit ad diem* or *solvit post diem*, and the law would presume satisfaction where no payment had been made for twenty years. But if upon such plea there was evidence of part-payment within twenty years, such evidence would rebut the presumption of law otherwise arising; it seems, though there is no precise authority to that effect, that any payment by a person having any interest, including a tenant for life, would have been sufficient to rebut such presumption. Then, the statute 3 & 4 Will. 4, c. 42, imposed a peremptory bar to all actions

after twenty years, with the exception in s. 5, if any acknowledgement had been made either by writing, part-payment, or part satisfaction. The further portion of the section shows that it was meant to reserve the remedy specially against the person acknowledging not treating the acknowledgment as setting the whole bond free, but only the action as to the particular party making the acknowledgement. There is no authority for saying that a bond comes within s. 40 of the 3 & 4 Will. 4, c. 27. The words of that section are, "any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent." A bond is no charge upon real estate whatever: it simply gives a remedy to the creditor against the heir which has been extended against the devisees, the property being in their hands. This results from the Statute of Fraudulent Devises, 3 & 4 Will. and Mary, c. 7, which makes devised lands liable just in the same way as if they had been left to descend, the statute saying that the devise should be null and void as against a creditor. The action, however, against the heir is purely personal, though the amount to be recovered must depend on the amount of the land. Equity, in order to avoid circuity of proceedings, and prevent a race between the several parties, allows the bond creditor to have his remedy against the land, and distributes the assets among the creditors. This, however, is not enough to bring a bond debt within the words of s. 40, unless in the mean time some part of the principal money, or some interest thereon, has been paid, or some acknowledgement of the right thereto has been given by the person by whom the same is payable. These observations will explain the following case and decision:—*F. M.*, tenant for life under the will of *J. M.*, who had, in 1826, given a bond to secure payment of £300, paid interest upon the bond debt up to 1847. *F. M.* died in 1854. Upon bill by the bond creditor, after the death of *F. M.*, to enforce payment of his debt: Held, that a bond debt was not charged upon or payable out of lands within 3 & 4 Will. 4, c. 27, s. 40; that *F. M.* was not the person liable to pay such bond debt, and had not by payment of interest kept it alive against the inheritance. Held, also, that under 3 & 4 Will. 4, c. 42, s. 5, the extension to creditors upon bond of the remedy to twenty years after an acknowledgement by writing, or part payment, or part satisfaction, is as against the person making such acknowledgement only, and does not enable the creditor to sue upon the bond generally. *Roddam v. Morley*, Week. Rep. 1855-6, p. 347.

MORTGAGE.—*Solicitor*.—*Costs of Mortgagee, what not.*—Costs for preparing a mortgage security, delivered to a mortgagor by a firm of solicitors, one

of whom is a mortgagee, are not mortgagee's costs. A firm of solicitors procured a mortgage from *A.* to one of the firm, prepared the mortgage-deed, paid for the stamps, and sent in a bill of costs for these matters to *A.* the mortgagor. A foreclosure claim was filed and the mortgagor paid the principal and interest due to and the costs of the claim. The claim was brought to a hearing, the plaintiff claiming the amount of the bill of costs as mortgagee's costs: Held, that those costs were due only from the mortgagor to the firm, and the claim dismissed with costs subsequent to the payment of the mortgage money. *Gregg v. Slater*, Week. Rep. 1855-6, p. 381; 2 Jur. N. S. 246.

MORTGAGE.—*Tacking simple contract against heir.*—In a foreclosure suit against the heir of the mortgagor, the mortgagee was allowed to tack simple contract debts due to him from the mortgagor. *Thomas v. Thomas*, Week. Rep. 1855-6, p. 345.

SURETY.—*Non-execution by co-surety—Release of surety—Equitable defence at law.*—The plaintiff executed a deed, by which he bound himself as co-surety with another person, for the debt of a principal debtor. The co-surety did not execute the deed. The creditor brought an action at law against the plaintiff, who pleaded the non-execution of the deed by the co-surety, by way of equitable defence. The creditor demurred to the plea: Held, that the plaintiff was entitled in equity to be discharged from liability under the deed, and to an injunction to restrain the proceedings at law. *Evans v. Bremridge*, Week. Rep. 1855-6, p. 350; 27 Law Tim. Rep. 8.

SURETY.—*Entitled to benefit of securities and that creditor should enforce his remedies—Paying off creditor, entitled to all securities—Creditor parting with subsequent securities.*—The contract of suretyship entitles the surety to require that his position shall not be altered by any arrangement between the creditor and the principal debtor from that in which he stood at the time of the contract, and it therefore entitles him, absolutely, to the benefit of all the securities, and for the debt which the creditor held at the time of the contract; it also entitles the surety at any time to require that the creditor shall enforce against the principal debtor not only all the remedies and all the securities for the debt which he has at the time of the contract, but also any securities for the debt which the creditor may have acquired subsequently to the contract, and which he holds at the time that the security requires him to proceed. And as a person paying off a debt for which he is liable, is entitled in equity to stand in the place of the creditor, and to have the benefit of the securities held by the creditor for such debt, so the surety, on paying off the debt of the principal debtor, is entitled

to require from the creditor the benefit not only of the securities for the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he holds at the time he is paid off. But there is no implied duty in the contract of suretyship which requires the creditor to retain for the benefit of the surety, securities for the debt which he might subsequently receive from the principal debtor, and which, whilst the creditor holds them, the surety does not call upon him to enforce. And a creditor who, after the contract of suretyship, having taken a further security from the principal debtor, subsequently parts with that security, does not thereby either wholly or *pro tanto* release the surety. *Newton v. Chorlton*, 10 Hare, 646; 2 Drew. 338.

VOLUNTARY ASSIGNMENT.—*Stat. 13 Eliz. c. 5—Acquiescence by creditor in acts affecting his rights.*—It is a clearly established principle that parties who, by their silence, have induced other persons to do any acts by which their position is altered can not afterwards be allowed to impeach such acts. A. was a bond-creditor of the testator, and had also a lien on an estate for unpaid purchase-money. The testator afterwards executed a voluntary assignment of the estate to his sons, which was prepared with the acquiescence and at the instance of A. The testator appointed A. his executor, who took no steps to set aside the assignment: Held, in a suit by A.'s personal representatives, that they could not now set the deed aside as fraudulent against creditors. *Oliver v. King*, Week. Rep. 1855-6, p. 382.

EQUITY PRACTICE.

BILL.—*Written bill—Omission to file printed copy in due time—Power of court to relax general orders.*—The court has power to relax any general order if a case for indulgence is made out. The Plaintiff's solicitor, having filed a written bill under the 6th section of the Chancery Improvement Act, omitted to file a printed bill in proper time, and the clerk of records and writs struck the bill off the file. The court, considering that sufficient excuse had been made for the omission, allowed the written bill to be restored, and the printed bill to be filed *nunc pro tunc*. *Terrand v. Corporation of Bradford*, Week. Rep. 1855-6, p. 350.

NEXT FRIEND.—*Married Woman—Security for costs by next friend not of ability.*—There is a great difference between a suit by the next friend of a married woman and of an infant. The next friend of a married woman suing as plaintiff must be a substantial person, capable of giving security for costs (see *Pennington v. Alvin*, 1 Sim. and St. 264; *Dunpon v. Mannix*, 3 Dru. and Warr. 154;

Stevens v. Williams, 1 Sim. N. S. 545). Proceedings in a second suit by a married woman will not be stayed until the costs incurred by her in a former suit against the same defendants have been paid. *Hind v. Whitmore*, Week. Rep. 1855-6, p. 379.

SOLICITOR AND CLIENT.—*Taxation after payment—Giving security—Mere overcharge without fraud not special circumstance after payment.*—A solicitor delivered his bill to his client, and by letter informed him that payment might be postponed if taxation were intended. The client gave the solicitor security for the bill, but no money was paid in respect of it: Held, that this was payment within the meaning of the 41st section of the 6 & 7 Vic. c. 73 (the Attorneys and Solicitors' Act). The client joined in the transfer of the security so given and on commencement of other matters employed the same solicitor and on their completion employed another solicitor, and paid the second bill of costs: Held, these were not special circumstances to justify the taxation of the bill of costs. Unless overcharge amount to fraud the court will not refer bills of costs for taxation after payment. *Exp. Turner*, 24 Law Journ. Chanc. 71.

SOLICITOR AND CLIENT.—*Payment on undertaking to refund—Mortgage.*—Upon paying off a mortgage, the bill of the mortgagees' solicitor, though objected to, was paid in full, the solicitor undertaking "to refund" so much of "the mortgagees' law charges" as might be "found to be in excess of what they were entitled to receive": Held, that the court would enforce the undertaking, upon petition, by ordering a taxation, and that it was to be as between the mortgagor and the mortgagees. *Re Fisher*, 18 Beav. 189.

SOLICITOR AND CLIENT.—*Taxation after payment—Pressure—Mortgage.*—A bill of costs was delivered on the day appointed to complete the transfer of a mortgage. It was objected to, but the solicitor of the mortgagee refused to complete until payment. The mortgagor paid it, but it was afterwards ordered to be taxed. *Re Philpotts*, 18 Beav. 84.

SOLICITOR AND CLIENT.—*Costs, items of, allowed and disallowed—Perusing bill of former solicitor—Filing certificate—Preparing lease—List of Deeds—Affidavits of Documents in possession—Consultation without fee—Instructions for briefs.*—Under an order for taxation £2 2s. was allowed to the solicitor then acting for the client for perusing the bill of his predecessor, it having led to a compromise (*In re Catlin*, 18 Beav. 510). Only one fee of 6s. 8d. is allowed for attending for and to file a certificate of taxation, and not 6s. 8d. to bespeak and for attending filing same (*In re Catlin*, 18 Beav. 513). A client was liable to a solicitor for the costs of procuring the

execution of a lease by her tenant, but which the tenant was to bear. The amount not having been paid when the order to tax was made: Held, that the charge was properly included in the bill of costs of the solicitor against his client. Charge of 18s. 4d. for a list of deeds handed over by a solicitor under an order for taxation disallowed. A solicitor is entitled to charge for the costs of the affidavit made by him on delivering up the papers under an order for taxation. Where no fee is paid to counsel on a consultation, no charge can be allowed to the solicitor for his attendance. The £1 1s. allowed by the orders of 7th of August, 1852, for instructions for brief, was intended as a compensation for the whole fee for abbreviating the bill, at 4d. a folio, which ceased on bills being printed. And where there has been a change of solicitors, the solicitor at the time of filing the replication is ordinarily entitled thereto. *Re Catlin*, 18 Beav. 517.

SOLICITOR AND CLIENT.—*Taxation of bill after payment* [1 Chron. pp. 14, 125, 302]—*Overcharges*—*Mortgage*—*Pressure*.—Where a client intends to pay a bill of costs at the meeting to complete a matter, the mere fact of the bill being then delivered, and of his paying it without having had an opportunity of examining it, will not alone be sufficient to entitle the client to a taxation, but such a circumstance forms a material consideration. Items of overcharge must be shown to warrant a taxation after payment. A mortgagor and her solicitor met the mortgagee's solicitor to complete, when the money was paid in three cheques, one of which was handed to the mortgagor's solicitor, who retained it for his costs. This bill was delivered at the time in a sealed packet. Items of overcharge being afterwards proved, a taxation was directed. *Re Abbott*, 18 Beav. 393; S. C. 23 Law Journ. Ch. 905.

SOLICITOR AND CLIENT.—*Order to deliver up papers, neglect to comply, costs of motion*.—By an order for taxation, the solicitor was ordered, on payment, to deliver over the papers. Having made default, he was ordered to pay the costs of a motion to compel him, though he had delivered them up after the notice of motion, but before it had been heard. *Re Minter*, 19 Beav. 33.

SUBSTITUTED SERVICE—*Lunatic—Claim*.—The court will not allow substituted service to be made upon the medical officer of the asylum where a lunatic defendant is confined. Semble, such service is to be effected upon the lunatic himself in the presence of the medical officer. *Morgan v. Jones*, Week. Rep. 1855-6, p. 381.

COMMON LAW.

AGENT.—*Principal's ratification of his agent's contract—Liability of principal for costs of agent in defending suit*.—A principal is liable to reimburse his agent for the amount of damages incurred by him in defending an action on behalf his principal, if the agent can show that the loss arose from the fact of his agency, that he was acting within the scope of his authority, that if he exceeded his instructions in the contract he entered into such excess has been waived, and the contract ratified by the principal, and that the loss was not attributable to any fault or laches on his own part. *Frizione v. Tagliaferri*, Week. Rep. 1855-6, p. 373.

HEIR AT LAW.—*Reference back of entry to time of right accruing—Trespass against lord by heir of copyholder—Abator*.—After entry by an heir at law, his right of possession relates back to the time his legal right to enter accrued, so as to enable him to support an action against a wrong-doer for a trespass committed at a time antecedent to the entry. It makes no difference in this respect that the wrong-doer is an abator, and the cases in which a contrary doctrine is laid down are not law. Therefore, an infant copyholder, after actual admission, may maintain trespass against the lord for wrongfully retaining possession after payment of the fine due on admission, and demand of admission, and before actual admission, *Barnett v. Guildford*, 11 Exch. Rep. 10; S. C. 1 Jur. N. S. 1142; 24 Law Journ. Exch. 281.

SHIPPING.—*Marine insurance—Time policy on outward-bound ship in home port—Warranty of seaworthiness—Loss from wrongful act of the assured*.—In a time policy on an outward-bound ship lying in a home port in which the assured resides, there is (per Lord Campbell, C. J., Coleridge, J., and Wightman, J.; dissentiente, Erle, J.), no implied warranty of seaworthiness, and the assured may recover for a loss from the perils of the sea, even although he knowingly and wilfully sent the ship to sea in an unseaworthy state. But (per totam curiam) he cannot recover if the loss has occurred in consequence of his wrongful act in so sending the ship to sea. *Thompson v. Hopper*, Week. Rep. 1855-6, p. 360.

TROVER.—*Refusal to deliver up chattel—Conversion*.—A mere refusal by the defendant to deliver to the plaintiff a chattel of his which is on the defendant's premises, is not evidence of a conversion, but a denial by the defendant of the plaintiff's right to it, or a refusal by which the defendant exercises a dominion over the chattel, is. *Wilde v. Waters*, 16 Com. Ben. 637; S. C. 1 Jur. N. S. 1021; 24 Law Journ. C. P. 193.

PROFESSIONAL NEWS.

SPECIALTY AND SIMPLE CONTRACT DEBTS ASSIMILATED.—Mr. Malins has brought in a bill "to abolish all distinctions between Specialty and Simple Contract Debts." This is a measure of great practical importance, to which it appears to us no valid objection exists, and which would considerably simplify several now abstruse and unsatisfactory doctrines of the law. Mr. Williams (Personal Property, 101) has so well described the various kinds of debts, and their different effects, that we shall be doing a service by calling attention to the subject. He concludes, "Thus, it will be seen that there are now, according to the law of England, five principal kinds of debts, namely, Crown debts, judgment debts, specialty debts in which the heirs are bound, specialty debts in which the heirs are not bound, and simple contract debts. Each of these classes has a law of its own, and remedies of varying degrees of efficacy. According to natural justice, one would suppose that all creditors for valuable consideration should have all equal right to be paid; or, if any difference were allowed, that those who could least afford to lose should be preferred to the others. Our law, however, takes precisely the opposite course, and, for reasons which certainly illustrate the history of England, gives to the Crown, representing the public in the aggregate, who can best afford to lose, a decided preference over private creditors, whose loss may be their ruin. Again; a debt admitted without dispute gives the creditor far less advantage than a debt which has been contested, and decreed to be paid by the judgment of a court of record. The proper function of a court of judicature would seem to be the settlement of disputes. In our law, however, the judgment of the court is permitted to be made use of not only to settle contested claims, but also as a better security for money admitted to be due. The reason of this perversion of the proper end of a judgment has been the superior advantages possessed by a creditor having a judgment in his favour. So long, however, as the court exercises its legitimate function of deciding on contested claims, there seems to be no reason why a debt, established by the decision of the court, should have any preference over one which has never been disputed. If this were the case, the use of judgments as mere securities, by collusion or agreement of the parties, would at once fall to the ground, and an end would be put to a very fruitful source of litigation and fraud. Practically there are but two reasons why payment of a debt is withheld, namely, either because the debtor, though able to pay, doubts his liability; or because he is

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unable to pay, though he knows he is liable. In the first case an action at law decides the question; but the judgment given by the court in exercise of its proper function is scarcely ever followed by the taking out of execution. The debt being established, the debtor pays it, and the judgment is immediately satisfied. The creditor has the advantage of the decision of the court, but he has no occasion for any of those extraordinary remedies to which his position as a judgment creditor entitles him. If, however, the debtor is unable to pay, judgment is obtained merely for the sake of its fruit. The creditor endeavours, by suing out an execution, to obtain an advantage over other creditors, who may not have put themselves and the debtor to the same trouble and expense. But inability to pay one debt is presumptive evidence of inability to pay others; and when a man is unable to pay all his creditors in full, it is time that a distribution should be made of his property amongst his creditors rateably. The extraordinary privileges conferred on a judgment creditor seem, therefore, in most cases, practically to end in an undue preference of a pressing creditor over others who have as good a right to be paid. With respect to the three last classes of debts, namely, debts by specialty in which the heirs are bound, those in which the heirs are not bound, and simple contract debts, the distinctions between them serve principally to mark the steps of the struggle by which the rights of creditors have at length been obtained. The trophies of a victory so hardly won can scarcely be expected to present a very orderly appearance. The rights of these creditors accordingly vary, by the accident of the death of the debtor, with the proportion which his real estate may bear to his personalty, and with the circumstance of his having or having not charged his real estate by his will with the payment of his debts; although, as we shall see, he can bring them all to a level by becoming, if he please, a bankrupt or insolvent. Surely it is time that the law of debtor and creditor were placed upon some more simple and reasonable footing."

LEGAL PUBLICATIONS.—LAW MAGAZINE AND LAW REVIEW.—The condition of the profession has re-acted upon the existing legal publications, in such a manner as to make some of the old established publications take measures for putting their houses in order, and adopt measures to suit the changes in the times. It now appears that the Law Magazine, after an existence of nearly thirty years, has been compelled to effect a junction with its younger competitor, the Law Review, and that henceforth, we are to have only one quarterly law publication. This is not the time for saying anything harsh, yet

we cannot avoid remarking that the Law Magazine has, for some time past, not come up to the old standard, and the Law Review was chiefly kept on its legs by being made the organ of the Law Amendment Society. A late attack on the former of these publications in a weekly contemporary, in the course of which the writer allowed himself to indulge in language not usually considered proper, or even decent, is likely to have very different effects from those desired, and may lead to such an exposure of law literature, as may not be pleasant to some parties.

ABOLITION OF WRITTEN AGREEMENTS AND REPEAL OF STATUTE OF FRAUDS.—Probably one of the most startling proposals of the day is that contained in a clause of the bill brought in by the Lord Chancellor for assimilating the mercantile law of the united kingdom, which proposes to repeal sec. 17 of the Statute of Frauds, by which no contract for £10 or more is valid, unless made in writing and signed by the party chargeable, or unless there have been part acceptance or payment. It appears that this provision of the Statute of Frauds, is regarded with favour in London, whilst in Manchester and elsewhere it has been but little regarded, and in Scotland has no force at all. The feeling in London is so adverse to the proposal, that a petition has been presented against it, in which the petitioners state "That the mercantile business in the city of London has grown up under, and has adopted itself to, the provisions of the said act; and while your petitioners apprehend great risk and danger from a departure from this practice, they are unable to discover any advantage in the proposed alteration. That the law imposes no unnecessary technicalities on contracts; they are required to be in writing, but may be in any form convenient to the parties, and are frequently effected by letters between the principals. That in London a large part of the contracts are negotiated by brokers; and by the present practice all contracts entered into by a broker are sent to principals, who are entitled to reject the same within twenty-four hours if not in conformity with the intentions of the parties. That these provisions insure certainty, and give confidence in transactions in business, the importance of which can scarcely be appreciated. That your petitioners conceive, that notwithstanding the proposed alteration of the law, all contracts of importance will continue to be reduced to writing; but your petitioners will lose the protection the law now gives them. That if the law shall be altered your petitioners may be called on at a lapse of many months to perform contracts of which they have no knowledge, arising out of misconception of those with whom they have been engaged in treatises, or of brokers or agents, to say

nothing of the risk of fraud and collusion on the part of brokers and agents, the result of which must obviously be an increase of litigation and perjury. That a large proportion of the contracts entered into contain stipulations as to the period of the arrival of the shipment, or the delivery of goods, besides provisions as to their quality and price; and the value of the contract mainly depends on these details. That unless those stipulations are reduced to writing, there can be no certainty that buyer and seller are agreed upon the contract they have entered into. That your petitioners attach great value to the principle now acknowledged, that none but written contracts are valid in law. Those who choose to rely upon an honourable mutual understanding can now do so, but in practice it is rarely ever done, from a sense of its inconvenience. The measure now contemplated would not probably alter the practice of using written contracts, but would deprive the merchant of the security he now possesses in the knowledge that he is bound by no agreement which has not been accepted and revised by him, or which he has not had the opportunity of revising."

REVERSIONARY INTERESTS OF MARRIED WOMEN.—Mr. Martin has again brought in his bill to enable married women to dispose of their reversionary interests in personal estate, thus further weakening the protection which the law throws around a married woman.

CONSOLIDATION OF THE STATUTE LAW.—It would appear from the statement by Sir F. Kelly, on the 18th of April last, that the above commission intended at last to make some progress, it being stated that the Statute Law Commission had resolved upon the consolidation of the entire statute law of England, and were now taking steps with the view of effecting that object. The bills for consolidating the statute law would be reduced into classes, and each class would be sub-divided into single bills. With regard to the bills relating to offences against the person, it had been thought desirable that they should all be laid upon the table at one and the same time, and should go *pari passu* through their different stages. The whole class of bills on the criminal law would be prepared and ready to be laid on the table in six weeks from the present date; while those with respect to the mercantile law would be completed in sufficient time to enable them to be discussed and passed during the present session.

APPEAL IN BANKRUPTCY WHERE NO ADJUDICATION.—The Court of Appeal in Chancery has decided, that an appeal will lie from the decision of a commissioner refusing to adjudicate a trader a bankrupt—a point upon which much doubt existed.

CONSOLIDATION OF THE STATUTE LAW.

Our readers are aware that there is a commission in existence for the purpose of considering and reporting upon the Consolidation of the Statute Laws, and that some time ago a first report was made by the commissioners, and now the commissioners (to whom some additions have been made under a supplemental commission) have issued a second report. From this latter document we propose to extract some of the more important points touched on. The commissioners commence by stating that they have considered the subject of such rules as might tend to insure simplicity or uniformity or any other improvement in the form and style of future statutes, and add:—"We have had under our consideration two plans, the adoption of which will materially promote the object indicated: 1, the appointment of an officer or board to revise and improve the current legislation; and, 2, the adaptation of a system of classification to the public general statutes. These two plans are entirely independent, and either one or both may be adopted or rejected.

"I. *As to the appointment of an officer or board to revise and improve the current legislation.*—We have already shortly adverted to this subject in the concluding paragraph of our first report. Further consideration has convinced us of the necessity of taking such a step, if any material amendment of the present form and style of legislation is to be effected. The true causes of the present confused and unsatisfactory state of our statute book do not lie very deep. They are such as must, to a certain extent, perhaps, operate in all free deliberating bodies like our Parliament; but the evil admits of being remedied to a considerable degree. In respect of form, a conventional language, verbose and obscure, had by long practice come to be considered almost essential in composing Acts of Parliament, so that the persons engaged in drawing bills have felt themselves nearly debarred from the use of a plain and concise style. In respect of matter, the legislator is frequently not aware of, or is indifferent to, the extent to which his proposed measure will affect other branches of the law; or is not aware of the exact state of the law with which he proposes to deal; or omits to state distinctly to what extent the new measure is intended to repeal or supersede the existing law. Again, when an evil is felt, the remedy is usually applied only to the particular case in which the inconvenience has been perceived, instead of amending generally the error or defect which has produced the result complained of. Perhaps, however, the chief cause of confusion is the way in which hasty and inconsistent amendments, ill assorting with the rest of the measure,

are made while the bill is going through committee. The proposers of these amendments have often only their own objects in view, and do not consider how far they will affect other parts of the measure itself. The promoter of the bill too frequently assents to alterations and changes which he does not approve, for the sake of averting a protracted opposition; and thus the bill often comes out of committee in such a form as to justify the expression of Lord Tenterden that 'through the legislature cannot be deemed *inopes consilii*, yet we lament to find it *magnas inter opes inops*.' It seems obvious that the existence of any officer or board, ready at the right time to give information and point out errors, and competent to prepare bills, when required so to do, in plain and concise language, would be very effective in remedying the evils above indicated. Some such plan becomes still more essential, if any system of consolidation of the statutes is to be carried into effect.

Appointment of an officer or board.—We therefore beg leave to submit to your Majesty that in our opinion the most effectual method for insuring simplicity and uniformity in, or otherwise improving the form and style of future statutes would be the appointment of an officer or board, with a sufficient staff of assistants, whose duty it should be:—To advise on the legal effect of every bill which either House of Parliament should think fit to refer to them, and, in particular, on the existing state of the law affected by the proposed bill, its language and structure, and its operations on the existing law; and also to point out what statutes it repeals, alters, or modifies, and whether any statutes or clauses or statutes on the same subject-matter are left unrepealed or conflicting; so that the House may have at its command the materials which will enable it to deal properly with the bill. The only material objection which has occurred to us as likely to be made to such a scheme as that proposed, is the danger of making the authority of the legislature to some extent, subordinate to that of such a board or officer. It does not, however, appear to us that there is much weight in this objection; the officer or board would be a servant, not a master, as we do not contemplate that such officer or board should report on the policy or expediency of any proposed measure. The powers of both Houses, and of all the members of each House, would remain inviolate. But assistance would be provided for them, as well in advising on the effect of the bills at the time of their introduction, as in watching them during their progress through Parliament, and keeping them in harmony with the whole law. The labour and anxiety of all members of Parliament would thus be materially relieved, and the legislation of the country improved. A great saving of time would also be

effected; for discussions which now arise, and amendments which it is now necessary to introduce in the various stages of the bill, would often be avoided. We have used the terms 'officer or board' because our plan no doubt admits of being worked by either means; but we are of opinion that a single responsible person, with adequate assistance, would be preferable to a board for carrying into effect a work of this kind. Perhaps there are few cases in which delay and uncertainty of action are not caused by the divided responsibility and sometimes divided opinions of a board; but in a case like the present, requiring the invention, or at least the practical application of a new mode of procedure, the exercise of much discretion, and the power of rapid decision and action, it would seem that anything like concurrent authority would be inconvenient, and that a single responsible head, with a well organised staff of assistants, would work better. We think it would be convenient that the proposed officer should be the same for both Houses.

"II *As to the classification of the public general statutes.*—We now pass to the second of the two plans mentioned at the commencement of this report:—A classification of enactments is incident to the consolidation of the statutes; but the plan to which we have now to direct attention is an arrangement for the division of the public general statutes of each session, as they are passed, into leading classes; and as a preliminary measure, the corresponding qualification or 'grouping' of the public bills. The only classification of the statutes now established by authority is the division into public general, local and personal (declared public, &c.), private printed, and private not printed.

"*Statute laws on any subject, dispersed in several volumes relating to other matters.*—The practical difficulty to be dealt with in the case of the statutes is that the law which relates to any given subject, or which affects any given class of persons, is dispersed in a large number of volumes among laws relating to other subjects and to other classes, and among enactments some of which have ceased to be laws, and some of which never were laws, in the sense of permanent 'rules of civil conduct.' This difficulty has grown to its present magnitude by the neglect of obvious precautions. To make the several portions of any large and growing mass of written matter accessible, one obvious precaution is to resort to some arrangement or classification. But in the case of the public general statutes there is no arrangement or classification whatever. The public general statutes of each session, as they are presented by authority to those whom they may concern, are a mass of documents differing essentially from one another in their character, and in the continu-

ance and extent of their operation, thrown together fortuitously in the order in which they are assented to by the Crown,—an order purely accidental.

"*Evils of neglect of classification.*—The evil of this neglect of classification will be more glaring if the functions and current business of Parliament, and the marked differences in character of the acts which are so thrown together, be examined in detail. In the first place, among the public general acts of each session are to be found statutes (more numerous than would be supposed by those who have not examined them with a special object) which cannot properly be called 'laws,' in the sense above indicated.

"*Blackstone's distinction between law and other acts.*—Blackstone indicates sufficiently the distinction between law, which is 'the rule of civil conduct,' and other acts of the supreme power. 'Law' he says 'is a rule; not a transient sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law, for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence. But an act to declare that the crime of which Titius is accused shall be deemed high treason, this has permanency, uniformity, and universality, and therefore is properly a rule.'

"*Private acts and some public acts not properly laws.*—It requires no argument to prove that acts which are now termed private are not properly to be classed among such laws; for instance, an estate act, or a divorce act. But there are many acts now included in the public general statutes which, though of public concern, because they affect property dedicated to public uses, are as little entitled to be considered 'laws' as a private estate act, for instance, the act of 1853, to authorise the sale of the Excise Office in Broad Street, which is as strictly an 'estate act' as if it had been passed for the convenience and at the instance of private persons. There are also among the public general statutes classes of acts of a different character, which though they are of the highest public importance, are as little entitled to be ranked among 'laws.' They are merely acts (often transitory acts) of administration.

"*Parliament performs many acts not properly legislative.*—Many of our constitutional usages are directed against the possibility of the machine of government going on without a Parliament. As a consequence of this jealousy, Parliament, in addition to the proper business of legislation, performs many acts which in most countries would be deemed

executive only. To take one of the most important of these:—An appropriation act is passed at the end of every session, to direct to what purposes all the public revenue of the year not previously appropriated shall be applied. Such acts are in effect nothing more than warrants to the public functionaries; 'the operation of [each] act is spent' (as Blackstone expresses it) in the transaction which is authorised. When the Treasury and the Exchequer have issued the money in accordance with the directions of an appropriation act, the statute is as a cheque on a banker that has been paid: it is of no consequence but as a matter of audit or of history. There are other administrative acts of Parliament which are not so transitory in their operation; for instance, the loan acts, which authorise the creation of perpetual annuities, or the like; but even these have enough of a special and transitory character to make it convenient to separate them in the way of classification from other statutes. When rules of law applicable to securities of the like nature are established, all that is important in the act which authorises the loan is the amount of annuities of which the creation is warranted, and the terms on which they may be acquired by those who advance the money to the public. When these terms are complied with, the act ceases to be of importance even as a title-deed,—for no one buying three per cents. can ascertain under which of the multitude of loan acts the stock which he takes has been created. The number of acts above referred to would in itself justify some classification, of which one object should be to separate from the other statutes those acts which are not properly 'laws'; every act, in short, of which the operation is spent on one transaction. It does not necessarily follow that every such statute should be brought into the same class, for there may be a convenience in classifying acts of administration as well as acts of legislation. It is enough for our present purpose to say that they should not be mixed up with general laws.

"Mutiny, Militia, and Revenue Acts."—But in addition to those administrative acts which are not laws, there are other statutes connected with the current administration of public affairs which seem to have claims on more than one ground to be placed in classes apart from other laws. The Commissioners here refer to the Mutiny, Militia, and Revenue Acts, and observe that the acts relating to the revenue, and those financial acts of administration which have been before described, will be found to make up a considerable portion of the statutes of every session. In the outline of a classification of the acts of the last session which we are about to submit for consideration, they are placed together under one head.

"Territorial extent of proper laws."—Another obvious principle of classification is to make manifest, as to the public general acts which are properly "laws," the territorial extent of their operation. Dismissing for the present what are termed local acts, a statute may be found to be applicable—To the United Kingdom (with or without the Colonies or Foreign possessions of the Crown); to Great Britain; to England and Ireland; to England only; to Scotland only; to Ireland only; to the colonies, or some of them; or, to the territories under the Government of the East India Company. All these acts concern different countries, the previously existing laws in which may be different. It is unnecessary to urge that a legislature giving laws to different territories should set forth distinctly to what territory each law applies, and so publish it that it may be easily accessible to those whom it concerns, without being a burthen to others. There is no reason why the people of Scotland, for instance, should be burthened with the acts applicable to Ireland only. It is not sufficient to say that each act is sold separately, for it is necessary to examine all the acts to know which of them applies to each country. The titles often give no indication of the extent of an act; and the letters U. K., E., I., and S., &c., which are to be found in the Index to the public general acts, have no authority, and are not free from doubt and mistakes. Indeed, the absence of classification, as it relieves the promoter of a bill from the necessity of declaring to what territory his measure is to extend, sometimes leads to enough of uncertainty as to the extent of the operation of the act to excuse a mistake of the most careful index maker. We would therefore suggest that all acts in the nature of general laws should be placed in classes intitled according to the territories to which they extend, excepting always those laws which from other considerations may be thrown more conveniently into special classes.

"Bad arrangement of local acts."—The same considerations which should prevent the mixing up of the acts relating exclusively to Ireland with those exclusively relating to England or Scotland apply with greater force in the case of the acts relating to parts only of any of the three countries, commonly known as local acts. Of those local acts which are now ranked among the public general statutes there are some which cannot be preferred on the score of extent of operation or importance to others which are found in the local and personal series. Some are treated as public and general because they have been introduced by public departments for considerations connected with the administration of justice or public business; others because they

extend to districts so considerable (as, for instance, some bills concerning the metropolis) that it would be attended with inconvenience or hardship to apply to them the rules which govern the proceedings on private bills. It is proper to note one circumstance which has specially contributed to the insertion among the public general statutes of acts strictly local or private, and which has tended to swell and complicate the statute book. Parliament, for the sake of sparing to private persons and communities the expense and trouble of soliciting private bills, has authorised in some cases administrative departments or commissions to effect arrangements for private or local convenience, which formerly required in each case the sanction of a separate act. But to guard against abuse, and to afford to individuals some protection in lieu of that which the power of opposing a private bill affords, a Parliamentary sanction is required to be given to the orders of the department or commissioners by a public general act. In this way the orders of the Inclosure Commissioners relating to inclosures (great and small, but all merely local or private transactions), and the orders of the General Board of Health for the application of the Public Health Act to towns, and the like, are continually brought to Parliament for confirmation. Thus, Inclosure Act, 8 & 9 Vic. c. 118, s. 32. Public Health Act, 11 & 12 Vic. c. 63, s. 10. So the arrangements between turnpike trusts and their creditors, under 14 & 15 Vic. c. 38; and applications under the charitable trusts acts. It is no impeachment of the policy which has led to these acts to say that there can be no reason whatever for confounding them in the same mass with public general statutes.

"*Local acts should be classed with special acts.*—To prevent the multiplication of classes, it would probably be well to place the local acts which have been referred to in the same series with those special acts before described, which, so far as respects their limited operation may be assimilated to private or personal acts. The object of putting local acts in a class apart is to prevent them from continuing to encumber those who have no concern with the places to which they relate, and there will be no increased danger, in consequence of such an arrangement, of any such statute escaping the notice of those who are to be affected by its enactments.

"*Classification of acts of last session.*—The best test of the effect of classification will be to throw the acts of a given session, the last session, for instance, into separate classes. The public general statutes of 18 & 19 Vic. are 134, which occupy 1,005 octavo pages. The following is the number

of acts and of pages found in each of the classes into which, by way of illustration, the mass may be divided:

18 & 19 VICT.

	No. of Acts.	No. of Pages.
1. Army, Navy, and Militia	11	158
2. Revenue and other Financial Acts	80	177
3. United Kingdom.....	12	93
4. Great Britain	2	10
5. England and Ireland	4	20
6. England	22	103
7. Scotland	6	31
8. Ireland	12	17
9. Special and Local	27	307
10. Colonies	6	86
11. East Indies	2	8
	184	1,005

The classes here given are suggested for illustration only, without presuming that the classification may not be improved, nor that some variation might not be made in the numbers, after a full consideration of the contents of the statute book. The acts in each class would of course be numbered in a separate series, and each class would, at the end of the session, form a separate *fasciculus* or 'part.' To a large majority of the readers and buyers of the statutes (if those of the last session had been so classified), the parts which contain the public general laws relating to

The United Kingdom . . .	(93)
Great Britain	(10)
England and Ireland . . .	(20)
And England (only) . . .	(103)

— 226

In all, 226 pages, instead of 1,005, would be sufficient. It is enough to suggest the consideration what the effect of this separation into classes would have been if it had been applied to the public general statutes of every session during the last and the present century. These proposals for a classification of the statutes are entirely independent of those contained in the former part of this report for the appointment of an officer to revise and improve the current legislation; yet, should such an officer be appointed, and any such plan as that now suggested be adopted, it would probably be found convenient to charge him with the duty of superintending the due arrangement of the acts of every session."

PARTITION UNDER POWERS OF SALE AND EXCHANGE.

WE have before (vol. 1, pp. 96, 97), considered the point whether a power to trustees to sell, will authorise them to make a partition, and among other cases referred to, *Brassey v. Chalmers* (16 Beav. 223). In the recent case of *Bradshaw v. Fane* (27 Law Tim. Rep. 25; 2 Jur. N. S. 247) V. C. Kindersley considered that the question whether the ordinary power of sale and exchange would authorise a partition, to be so doubtful, that he would not make an unwilling purchaser take a title depending upon a partition made in exercise of such a power. It appeared that a settlement contained a power of sale, disposition, and exchange of lands, &c., together with provisions for effecting the sales, exchanges, or dispositions aforesaid; and also a direction to the trustees for sale of the property to apply the money to be received for such equality of exchange or partition in a certain specified manner. The parties interested in the property executed a deed, intended to effect a partition of the estate. A part of the property after having been so dealt with, was contracted to be purchased, when an objection was taken to the title of the vendors, on the ground that the before mentioned powers did not authorise a partition of the property, and the court held, that the purchaser was not bound to complete (*Bradshaw v. Fane, supra*). The V. C. in his judgment said:—"The question presents itself in two forms. First of all, there is the abstract question, which has been so much disputed, both before me now and in several other cases, whether the ordinary power of exchange authorises a partition; that is to say, not only a partition strictly in the form of a partition, but also in the form of an exchange. The other question is, whether this particular case does not stand on a different footing. Now, as to the abstract question, the conclusion at which I shall arrive is this—that so far as the decision upon this question turns upon this point, I must consider it too doubtful to force the title upon an unwilling purchaser. The authorities stand thus—the earliest case is that of *Abel v. Heathcote*, (2 Ves. jun. 98; 4 Bro. C. C. 278), in which Lord Rosslyn certainly expressed his opinion that a power of sale would authorise a partition, at all events in that particular case. In *McQueen v. Farquhar* (11 Ves. 467) the question was raised by Lord Eldon, whether the power of sale authorised a partition, and that gave rise to a discussion as to the power of exchange; and Lord Eldon, commenting on *Abel v. Heathcote*, expressed his opinion strongly that a power of exchange would not authorise a partition, and

that *Abel v. Heathcote* depended upon the special words; and though we have no report of the case to which reference was made, yet it appears from a note in Belt's edition of 4 Bro. C. C. 285, that Lord Eldon expressed an opinion that a power of exchange would not authorise a partition. In *The Attorney-General v. Hamilton* (1 Mad. 214) the question was, whether certain persons should be made parties, which depended upon whether a power of sale so authorised a partition as that it was unnecessary to have these parties before the court; and it was considered so doubtful that they were held necessary parties. Then came the case of *Doe v. Spencer* (2 Exch. 752), in which the judgment of the present Lord Chancellor was given, the question arising under an Inclosure Act, which authorised exchanges, the language of the act being much the same as that in ordinary powers; and there all the cases were commented on, and it was said that there is no authority for that which is laid down in *Shep. Touch. 222*. There a clear decision was come to by the Court of Exchequer, that in the case of two coparceners it might be done, but where there were three it could not. Now, so far as I am at liberty to express an opinion, I should say that I agree in the proposition, that the rule as laid down in the Touchstone is not correct as to tenants in common, though it may be as to joint tenants; but I confess I cannot understand why, if the thing may be done as between two, it may not be done as between three or more. Suppose there are three estates, Whiteacre, Blackacre, and Greenacre, of which A., B., and C. are tenants in common; A. dies, having devised his share to trustees, with the ordinary powers of exchange; why, then, if the object is, that A.'s estate should be held in severalty, may the trustees not make an arrangement with B. that B. shall give his share of Whiteacre to A.'s devisees, who will give up their share of Blackacre to B.? Surely that would be good. And why may they not make a similar arrangement with C.?—it being immaterial to them whether B. and C. made a similar arrangement; but why would it not be good as to A.? If the law is rightly laid down as to two, why is it not good as to three? But after this case the question arose in the case of *Brassey v. Chalmers* (16 Beav. 223), which was under a power to sell and dispose of; and the question was, whether these words, either by themselves, or taken in conjunction with the other words, would authorise a partition; and it is evident that the opinion of the Master of the Rolls was, that it was a doubtful question; and I think the inclination of his mind was that it would not. These, I believe, are the only authorities which can be brought distinctly to bear upon the question;

and, with the exception of *Abel v. Heathcote* and *Doe v. Spicer*, they are dicta merely. Then, if we refer to the text-books, we find that Lord St. Leonards, whose authority in every respect stands higher than that of any other person, represents the matter as being still uncertain. Chance (p. 147) is of opinion that it is unsettled. Jarman (6 Jarm. Conv. 594) expresses his opinion to be, that a power of exchange would not justify a partition. Preston, in his note to the Touchstone, says he does not think the position in the Touchstone to be good law. This is the state of the authorities; but I confess, that looking at it as a question turning on the ordinary power of sale and exchange, the matter remains in such a state of doubt and uncertainty that I could not force such a title upon an unwilling purchaser, and could not force the trustees to complete this sale; and that brings me to the remaining question, which is, assuming the abstract question to be doubtful, or even assuming that the ordinary form of words would not authorise a partition, does the power in this case make the matter stand upon a better footing? His Honor then observed, that the power was inaccurately penned, and appeared as if in the draft as originally prepared there had been clauses which were struck out. The only property settled was an undivided moiety, and the power expressly authorises an exchange for parts or shares, which, however, cannot refer only to the other moiety, for both copyholds and freeholds are mentioned. Still, it would seem that the framer of the power had in his mind another mode of disposition besides sale or exchange, and must refer to a partition. The power must be construed fairly, but strictly, and in his Honor's opinion did authorise the parties to exchange the undivided moiety in these lands for the other moiety, so that the lands shall be held in severalty. His Honor's opinion therefore was, that this title ought to be accepted as a good title under the circumstances."

EXECUTORS POWER TO SELL REAL ESTATE UNDER A CHARGE OF DEBTS.

The cases of Robinson v. Lowater (17 Beav. 592; Week. Rep. 1853-4, p. 182, 394; 5 De Gex Mac. and G. 472), and *Wrigley v. Sykes*, (Week. Rep. 1855-6, p. 228; 26 Law Tim. Rep. 252; 2 Jur. N. S. 78), considered and doubted.

A discussion has been originated in the Jurist (part 2, p. 68) as to the correctness of the decision of the Master of the Rolls in the late case of *Wrigley v. Sykes* (*suprà*), following his own previous decision in *Robinson v. Lowater* (*suprà*), which

is deserving of attention. The point doubted is to this effect, that a general charge of debts and legacies by a will, followed by a term in trustees not being the executors of the will, for raising by sale or mortgage of the share of each devisee the proportions of the debts and legacies chargeable thereon and unpaid by him, gives the executors a power of sale. The Master of the Rolls thus stated the reason for so deciding: "A general direction that debts should be paid was considered before the statute sufficient to raise by implication a charge of debts upon real estate which was not in the then state of the law generally applicable to the purpose. Where there was mere expression of a desire that the debts should be paid, and the testator afterwards designated for that purpose a fund not otherwise applicable to debts in the old state of the law, the court, in dealing with the question has been in the habit of treating the expression of that desire as qualified by the choice of a particular fund for the purpose. But if the testator began with an *express charge of all debts* on his real estate, this was considered as a devise not to be cut down afterwards except by distinct words, and the subsequent creation of a particular fund was not to supersede the general direction. The cases of *Palmer v. Graves*, (1 Keen 545), and *Cox v. Bassett* (3 Ves. 155), illustrate this. In the former a general direction that the debts should be paid was held to be controlled by a subsequent charge. In the latter a general charge of debts and legacies was held not to be antulled by a subsequent power to sell a particular estate for the same purpose although the latter property was to be first applied." In this case of *Wrigley v. Sykes*, the circumstances, shortly stated, were this: a will (made before the late statute) contained a general charge of debts and legacies upon real estate, and the testator then devised his estates to his five sons (whom he appointed executors) in equal shares, each charged with the payment of a one-fifth part thereof, and created a term of 500 years in the property, which was vested in trustees who were not any of the sons or executors, for the purpose of raising out of the share of any of his devisees, by sale or mortgage, the share of the debts charged thereon in case he or they should make default in payment after demand: The Master of the Rolls held, that this special trust did not prevent the operation of the general rule that a general charge of debts on real estate gives the executors an implied power to sell for payment thereof.

The subject in question was not long ago brought under the consideration of the court of exchequer in the recent case of *Doe d. Jones v. Hughes* (6 Exch. 223). In that case Evan Hughes began his will by subjecting all his real and personal estate to

the payment of his just debts, funeral and testamentary expenses, and subject thereto he devised all his messuages, farms, and lands (*except his Bala Houses*) to his wife for life, with remainder to Hugh Hughes in fee. The Bala houses, being excepted from the devise, descended to the testator's heir-at-law; and the court, after an able argument, in which all the principal authorities were cited, and after taking time to consider, delivered an unanimous judgment, that the executrix of the will had no implied power, by reason of the charge of debts, to sell or mortgage the Bala houses, but that they descended to the heir, subject only to an *equitable charge* thereon of the testator's debts and funeral and testamentary expenses. The court remarked, that it was not within the principle of any of the cases in which it has been held that there is an implied power of sale or mortgage. "We have perfectly satisfied ourselves on that head."

In *Robinson v. Lowater* (17 Beav. 601), however, his Honour the Master of the Rolls made the following remarks on this case:—"The case of *Doe d. Jones v. Hughes* is relied upon to shew that the executor could not make a good title to sell, and had no authority to sell vested in him. I find it difficult to reconcile the decision in that case with the numerous authorities to be found on this subject in Chancery; amongst which I may refer to *Ball v. Harris* (4 My. and C. 264), where Lord Cottenham observes that a charge of debts is equivalent to a trust to sell so much as may be sufficient to pay them; *Forbes v. Peacock* (12 Sim. 541), which on this point is not affected by the reversal of the decision (1 Ph. 717); and to the case of *Gosling v. Carter* (1 Coll. 644). Before the case in the Exchequer, I had considered the law to be, that a charge of debts on an estate devised gave the executors an implied power of sale; because, to use the expression of Sir John Leach in *Bentham v. Wiltshire* (4 Mad. 49), 'the power to sell is implied from the produce being to pass through their hands in the execution of their office, as in the payment of debts or of legacies.'" The decision in *Robinson v. Lowater* was affirmed, on appeal, by the Lords Justices (5 De G., Mac. and G. 272), as we shall presently mention more at large; but the only reference made by the court to the case of *Doe d. Jones v. Hughes* was an inquiry by Sir J. L. Knight Bruce, L. J., whether that case dealt with anything beyond the question of the legal estate, and whether it could govern *Robinson v. Lowater*, which was an application to a court of equity to give effect to a charge.

It is clear that the duties of an executor as such, whether in payment of debts or otherwise, are by law confined to the personal estate of his testator.

If he takes any power over the testator's real estate, it must be from an intention that he should do so either expressed or implied by the terms of the will. If a man makes a will, and appoints A. and B. executors, and then directs generally that his lands shall be sold, without saying by whom, it is held that a direction in the same will, that the purchase-money shall be applied along with the personalty in payment of debts or legacies, implies a direction that A. and B. shall sell (*Tylden v. Hyde*, 2 Sim. and S. 238). A. and B. have accordingly power to sell, and to give a receipt to a purchaser; and if A. and B. were to renounce probate of the will, their power to sell the real estate would remain unimpeached (2 Sugd. Pow. 138, 6th edit.). For such power does not arise in consequence of their being employed to distribute the testator's personalty, but in consequence of an *intention gathered from the terms of the will* that they should have a power of sale. If, however, a testator simply charges his real estate with the payment of his debts, subject to which charge he devises his land to C. in fee, and appoints A. and B. executors, it is very difficult on any ordinary principle of construction, to see in this a direction that A. and B. should sell such lands, whether they accept probate of the will or not. Or does the testator mean to say that A. and B. shall sell his lands, only if they prove the will? Or can an intention still further be discerned, that if they renounce, the person to whom administration of the personalty may be granted should have the like power of sale? To make a man mean so much more than he says is not the ordinary way in which written documents are construed. The charge of debts, and even a general direction that they should be paid, was, in favour of honesty, held, and rightly held, when lands were not otherwise subject to debts, to be equivalent to a trust for their payment, even by sale if necessary. The trust is fastened on the land; and those who take subject to such a trust have, by necessary implication, the powers requisite for carrying such trust into complete effect. C. therefore may sell, and give a discharge to the purchaser; and if C. should misapply the money, the remedy of the creditors is against him personally. But this gives the executors no right to interfere. They, or, if they renounce, the administrator, may lawfully inform C. of the deficiency of the personal estate, and request him to sell; and it seems that they, or some or one of them, may lawfully concur with C. in the receipt of the purchase-money. C., however, who takes the land which is subject to the trust, must necessarily be the trustee, just as the heir of a trustee takes the trust estate subject to the trusts; or as the devisees, in whatever shape, of a trustee take,

subject to the trusts, the trust estates expressly devised to them by his will.

If a general direction by a testator, that his debts shall be paid, gives to his executors a power by implication to sell his lands, it ought to follow, *a fortiori*, that a direction that his debts shall be paid by his executors gives them a similar power. But, so far from this, the latter direction is held not to amount to a charge of the debts on the real estate, unless the executors are also themselves the devisees (2 Jarm. Wills, 523, 1st edit. ; 506, 2nd ed.). The distinctions thus established are in exact accordance with the principles above laid down. As the executors, as such, have nothing but the personal estate under their control, a direction, that the debts shall be paid by them, implies no charge on the lands. But if the executors are themselves the devisees, they are bound, as devisees, to pay the debts out of the lands devised to them.

The provisions of the legislature appear to throw some light on the question. The stat. 11 Geo. 4, and 1 Will. 4, c. 47, s. 12, enacts, that where any lands shall be devised in settlement by any person whose estate under that act, or by law, or by his will, shall be liable to the payment of any of his debts, and by such devise shall be vested in any person for life, with any remainder over which may not be vested, the court may direct the tenant for life to convey the fee-simple to a purchaser. This act was extended to mortgages by stat. 2 & 3 Vic. c. 60, and to heirs, subject to an executory devise over in favour of unascertained persons, by stat. 11 & 12 Vic. c. 87. But if a charge of debts on the real estate gives the executor power to sell it, there was no occasion for these enactments, so far as relates to wills by which debts are charged, and the proceedings in such cases as *Walker v. Aston* (14 Sim. 87) were altogether unnecessary.

It is true that in most, if not all, of the decided cases, the devisee who has sold has been either the executor or one of the executors, or has sold with the concurrence of the executors or one of them. It is also true that in *Ball v. Harris*, (4 My. and C. 264) the executrix appears to have concurred with the devisee, who was also an executor, in the receipt of the money for which the property in question was mortgaged. The mortgage however, or rather deposit, was expressed to be made by the devisee alone, the memorandum being in these words:—"I the undersigned William Harris, sole acting devisee in trust of the last will and testament of Richard Perrey, deceased, do hereby acknowledge to have deposited, &c. (8 Sim. 490). And the Lord Chancellor, in his judgment, remarks, "This case indeed is free from the difficulty which has occurred in some others, for Harris is devisee in trust of the legal

fee; and, it being established that the will charges the estate with the payment of the debts, it follows that Harris, being trustee for that purpose, must have the power of executing his trust" (4 My. and C. 267). Lord St. Leonards also gives the following account of this case:—"It may be that the devisee subject to the charge is a trustee for others, yet he may sell or mortgage, and give a good discharge for the purchase-money, only in that case he could not assume to sell as the owner of the estate" (Concise Vendors, 521). And in his well-known judgment in *Stroughill v. Anstey* (1 De G., Mac., and G. 646), his lordship, in commenting on *Ball v. Harris*, does not even mention that the trustees were also executors, but states that the testator devised his real estate to trustees in fee, upon trust for certain persons successively; and the trustees having mortgaged, the point raised was &c. In like manner, Lord Cottenham in *Eland v. Eland* (4 My. and C. 428), when commenting on *Johnson v. Kennett* (6 Sim. 384; 3 My. and K. 624), remarks, "What evidence is it of a breach of trust that a party, having such an estate subject to such a charge, sells the estate as his own? He is, in truth, the owner, subject to a charge, and it is his duty to satisfy the debts which the sale may be the very means of enabling him to do." In *Johnson v. Kennett*, the devisee was also executor; but neither Lord Lyndhurst, by whom the case was decided (8 My. and K. 630), nor Lord Cottenham in his comments on that case, nor Lord St. Leonards in his remarks on the same case in *Stroughill v. Anstey* (1 De G., Mac., and G. 652), thought it worth while to mention that circumstance; and the rule which the last-named eminent judge extracted from an elaborate review of the authorities is this—"that when a testator, by his will, charges his estate with debts and legacies, he shews that he means to intrust his trustees with the power of receiving the money" (*Id.* 653). Opposed to this is certainly the dictum, for it was nothing more, of Sir J. L. Knight Bruce, L. J (when Vice-Chancellor), in *Goaling v. Carter* (1 Coll. 650), who says, "*Ball v. Harris* seems to me to involve the decision that it was the executors who were to sell, and not the devisee." But the opinion thus expressed is founded on the argument, that if the devisee was the person to sell, he would have been the only person to receive the money; whereas, if the executors were to sell, then they were the persons to receive the money; and they did in fact receive the money (*Id.* 649). A right, however, to receive the money to arise from an estate when sold is not the same thing as a right to sell that estate, otherwise every person having an equitable charge on an estate to the amount of its value would have a right to sell it. This dictum in

fact, which was referred to by his Honour the Master of the Rolls, in his remarks on *Doe v. Jones v. Hughes*, is the only direct authority in favour of these remarks. For, as was observed by Alderson, B., in the latter case, "the language of the Vice-Chancellor (Shadwell) in *Forbes v. Peacock* (12 Sim. 541) must be taken *secundum subjectam materiem*." And the testator in that case expressly directed the property to be sold.

In *Walker v. Smallwood* (Amb. 676), where the testator devised his estates charged with payment of debts, Lord Camden in his judgment said, that the creditors had a right to call on the *heir or devisee* to execute the trust. He says nothing about the executor.

In *Dolton v. Hewin* (6 Mad. 9) the devisee was also executrix, and yet the rule which Sir Edward Sugden, in the three last editions of his *Vendors and Purchasers*, and his *Concise Vendors* (p. 520), lays down on the authority of that case is as follows:—"Where an estate is given to a devisee, he paying the debts, so that the words are sufficient to pass the fee, a purchaser from the devisee cannot be affected by any gift over of the estate, for the devisee has a right to sell to pay the debts; and if the price of the estate is more than will satisfy the debts, the remedy of the devisees over is against the first devisee, and not against the purchaser."

The decision in *Robinson v. Lowater* was, as we have said, affirmed on appeal (5 De G., Mac., and G. 272). It is to be regretted, however, that Sir J. L. Knight Bruce, L. J. did not state any grounds for his opinion. Sir G. J. Turner, L. J., in his judgment said: "that it seemed to him, upon the whole scope of the will, without reference to the cases decided upon the subject, that in that case at least it was the intention of the testator that the money should be raised by the executor; and if by the executor, then the executor must be considered as invested with all the powers necessary to raise it" (5 De G., Mac., and G. 277). This is a very cautious opinion, and by no means commits that eminent judge to all the doctrine laid down in the court below. The legal estate was outstanding, and the executor who sold *was himself also devisee for life*, with contingent remainders over. The nearest authority seems to be *Dolton v. Hewin*, above mentioned, on which it is submitted that the decision might perhaps be supported, as, according to that case, if the legal estate in fee had been in the vendor, subject to merely equitable remainders over, he might well have sold; and it could, it may be said, hardly make any difference that the legal estate was already in the purchaser, as happened to be the case.

In *Wrigley v. Sykes* the legal estate was also out-

standing, but it does not appear from the report of the case that this circumstance influenced his Honour's decision (2 Jur., N. S., 79); and the owners of three-fifths only of the estates were, as surviving executors, held clearly entitled to sell the whole.

To the above cases may be added the very recent one of *Eitesford v. Armstead* (Week. Rep. 279), where a testator, after charging his real estate with payment of debts, devised it to trustees upon trust for B. for life, and after her death, to the use of her appointees by will, and in default of appointment, to the use of her right heirs. The real estate was further charged with £700 for C. The V. C. (Wood) held, that the trustees had power to sell the estate in the lifetime of B., before her appointees could be ascertained for the purpose of raising the charge. It did not appear whether or not the trustees were also executors, but the whole discussion proceeded on the powers of the trustees as such. The V. C. considered that the trustees had power to bind the estate by sale, and that all the interests would be bound in equity. His Honor added that the case of *Robinson v. Lowater* (*suprà*) was an authority that you must look to the parties having the ownership of the estate at the time, and they are the persons who would have to apply the fund under the power given to raise the charge.

THE BANKRUPTCY LAW.

(Continued from p. 343).

Protected transactions—Warrants of attorney, Cognovits and judges orders—Actions and suits by assignees—Assignee becoming bankrupt, or retaining monies—Control of court over assignees—Proof of debts—Persons entitled to be paid in full or in priority.

Before quitting the subject of the property of a bankrupt and its vesting or not in the assignees and entering upon the subject of the proof of debts by creditors, it will be convenient to notice two matters which affect both subjects, viz., protected transactions and warrants of attorney, by means of which the property of the bankrupt may, on the one hand, be prevented passing to the assignees and becoming distributable among the general body of creditors, and on the other hand, the creditors so dealing with the bankrupt may cease to be creditors, and by obtaining payment in full, be placed in a better position than those creditors who have only a right to prove their debts against, and receive a dividend out of the bankrupt's estate.

PROTECTED TRANSACTIONS.

The property of a trader who is afterwards adjudged a bankrupt, upon his committing an act of

bankruptcy, belongs as from the time of the act of bankruptcy, to his assignees, except as this doctrine is modified in the particular instances we are about to mention. It was, in consequence of this rule that all conveyances by the bankrupt, executions, and all contracts, and other dealings and transactions by or with him respecting his property were formerly wholly inoperative, although made for a valuable consideration, and although the party taking the conveyance, issuing the execution and otherwise dealing with the trader had no knowledge whatever of an act of bankruptcy committed by such trader. This state of the law worked great injustice, and was by some modern statutes (see 6 Geo. 4, c. 16, ss. 81, 108; 2 & 3 Vic. c. 29; 1 Law Chron. 7) altered in favour of persons dealing with the bankrupt *bonâ fide*, and without notice of the act of bankruptcy. These statutes are now repealed, and sec. 133 of the Consolidation Act contains the enactments now in force. By this section all payments really and *bonâ fide* made by or to any bankrupt before the filing of the petition for adjudication; all conveyances by any bankrupt *bonâ fide* made and entered into before the filing of such petition, are all to be deemed valid notwithstanding any prior act of bankruptcy by such bankrupt committed, provided a person so dealing with or paying to, or being paid by such bankrupt, had not at the time of such payment, conveyance, contract, dealing, or transaction, notice of any prior act of bankruptcy by him committed. The section; however, provides that nothing therein contained shall give validity to transactions, by way of *fraudulent preference*. It should seem, too, that transactions in themselves acts of bankruptcy—for example, an assignment by a trader of all his property for the benefit of creditors—will not be protected. The notice of an act of bankruptcy may be general (see *Udall v. Walton*, 14 Mees. and Wels. 254). It will thus be seen that the provisions of the act apply to payments, conveyances, contracts, dealings, transactions, executions and attachments. The following is sec. 133 in extenso: "all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bonâ fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the date of the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt *bonâ fide* made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any

bankrupt *bonâ fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed: provided also, that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or *cognovit actionem* or judge's order obtained by consent given by any bankrupt by way of fraudulent preference."

Payments—Contracts, dealings, and transactions.—Payment may be by goods, or by settlement in account (4 Mees. and W. 211, 314). A lien, and indeed all contracts, whether express or implied, are within the above section of the act (*Bowman v. Malcolm*, 11 Mees. and W. 835). The above 133rd section extends the same protection to all contracts, dealings, and transactions by and with any bankrupt *bonâ fide* made and entered into, without notice before the filing of the petition for adjudication, as they would before have had if made and entered into before an act of bankruptcy (*Brewin v. Short*, 1 Jur. N. S. 798; 24 Law Journ. Q. B. 297).

Bona fides—Payments.—*Bona fides*, as applied to payments, means such as are honestly and fairly made in the course of an honest transaction, and not intended to be reclaimed (*Devas v. Venables*, 3 Bing. N. C. 503; *Gibson v. Muskett*, 4 M. and G. 170). A payment before the delivery of the goods would, in the absence of an express usage or bargain, be open to suspicion (see *Bishop v. Crawshaw*, 3 B. and C. 418). If there be not *bona fides* in the party paying, the section does not apply, mere payment not being a contract, dealing or transaction (*Turquand v. Vanderplank*, 10 M. and W. 180).

Executions—Bona fides.—It is to be remarked that the above 133rd section makes a difference in

favour of executions against the land, for it enacts that all executions against the land of any bankrupt *bona fide* executed by seizure (merely) shall be valid, whilst as to personal property a seizure and sale are necessary. With reference to executions, *bona fides* means *bona fides* on the part of the execution creditor (Belcher v. Magnay, 12 M. and W. 102). The old doctrine of relation applies to all executions, until there is a change of property by the sale (Hutton v. Cooper, 6 Exch. 159; 20 L. J. 123, Ex). And where the sale took place in lots, and deposits were paid on each lot, but before the goods were separated from the bulk a fiat issued, the sale was held to be only inchoate, and the assignees to be entitled (Ward v. Dalton, 7 C. B. 643). An execution creditor, to be safe, ought in all cases of executions against traders, to require an immediate sale. Any transaction being a fraudulent preference will still be invalid; and even a sale upon a warrant of attorney, or cognovit or judge's order, given by way of fraudulent preference (see sec. 135), will be liable to be defeated by a prior act of bankruptcy without notice; not by virtue of express enactment in this section, but by being excluded from the affirmative protection in the first part of the section (see sec. 184: judgment in Whitmore v. Green, 18 M. and W. 114; Garland v. Carlisle, 3 M. and W. 152). As to the effect of a second execution when the first is rendered void, see Congreve v. Evetts, 10 Exch. Rep. 298; Graham v. Witherby (7 Q. B. 491); in which case, it is to be observed, it was the fiat, and not a previous act of bankruptcy, that was relied on, as vesting the title in the assignees. In Lackington v. Elliott (7 M. and G. 538), it was discussed, and not decided, whether a distress was a transaction within 2 & 3 Vic. c. 29. *Semble*, it would be an attachment (*ib.*). As to receipts and payments by a servant in the way of business, after an act of bankruptcy committed by his master (see Kynaston v. Crouch, 14 M. and W. 266). A fiat was held to be issued under 1 & 2 Wm. 4, c. 56, s. 12, when delivered to the petitioning creditor, or some one on his behalf; but under 5 & 6 Vic. c. 122, the time of issuing was when it left the custody of the secretary of bankrupts, as when a country fiat was posted (Freeman v. Whitaker, 4 Exch. 834; 19 L. J. 351, Exch.; Hernaman v. Coryton, 5 Exch. 453; 19 L. J. 353, Exch.). By analogy to these decisions, it would seem that a petition must be *actually filed*, and not merely placed in the registrar's hands, in accordance with rule 8. The notice may be general that the trader has committed an act of bankruptcy (Udall v. Walton, 14 M. and W. 254); but it must be of an act of bankruptcy, not of a mere step towards it, which may or may not result in an act of bank-

ruptcy, nor even of an intention to commit an act of bankruptcy (Exp. Halifax, 2 M., D. and D. 544). Thus notice that a trader had filed a petition under sec. 76 would be sufficient; but not merely that he had signed it (see Conway v. Nall, 1 C. B. 643; Follett v. Hoppe, 5 C. B. 226). So notice of a docket having been struck was not sufficient (Hocking v. Acraman, 12 M. and W. 170). But notice of the specific act is not essential; thus, a letter from the bankrupt that he had committed several acts of bankruptcy would be sufficient notice (Udall v. Walton, *supra*). It may be given to the attorney in the cause (Rothwell v. Timbrell, 1 Dowl. N. S. 778); but not to the sheriff or his officer (Ramsay v. Eaton, 10 M. and W. 22), nor to a mere clerk in the attorney's office (Pike v. Stephens, 12 Q. B. 465; 17 L. J. 282, Q. B.). Without some ground for inferring that a clerk engaged in the cause, and receiving a notice, communicated it to his principal, the notice to him would be insufficient (see Pennell v. Stephens, 7 C. B. 987). In that case two of the learned judges intimated a doubt whether the notice ought not to be given to the creditor himself. Notice means actual knowledge, or wilfully abstaining from acquiring such knowledge. Thus a letter delivered at the office of the creditor's attorney would not operate until read, unless there was a wilful abstaining from reading it (Bird v. Bass, 6 M. and G. 143). Notice to one of two co-plaintiffs is *prima facie* notice to both (Edwards v. Cooper, 11 Q. B. 33), and per Coleridge, J., it would be notice to both, even though the other was proved to have been ignorant of it (*ib.*). In Fawcett v. Fearn (6 Q. B. 20), the purchaser from the sheriff was held not protected by reason of having notice, although the execution creditor had none, and the execution would have been valid against the assignees. But in Green v. Steere (1 Q. B. 710), it was said, that the knowledge or ignorance of the person who actually, not constructively, deals with the bankrupt, as to any prior act of bankruptcy, is the material question: and this is more in accordance with the statute. Fawcett v. Fearn must therefore not be implicitly relied on as to this point, especially as the judgment may be supported on another ground (See 1 Smith's Lead. Cas. 237). A notice by the solicitors of certain of the traders' creditors, who afterwards prosecute a petition for an adjudication is sufficient (Hope v. Meek, 10 Exch. Rep. 829).

Purchase with notice of act of bankruptcy not impeachable unless there be an adjudication within twelve months.—The 134 sec. of the Consolidation Act, contains an important clause, being similar to that in 6 Geo. 4, c. 16, s. 86, by which a person purchasing *bona fide* for consideration, though having

notice of an act of bankruptcy, will be safe after twelve months. At least, such is the general opinion; but the point is not without some doubt. The section enacts that "no purchase from any bankrupt *bona fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a fiat or petition for adjudication of bankruptcy shall have been sued out or filed within twelve months after such act of bankruptcy. This section refers to purchasers alone, but it may well be doubted whether, inasmuch by sec. 88 no person can be made a bankrupt after twelve months from the act of bankruptcy, the title of the assignees could, in any case, be carried back to a more remote act of bankruptcy even with notice. If an act of bankruptcy necessarily mean that upon which a man can be made a bankrupt, the lapse of time would purge the act of its character, which, ordinarily speaking, cannot be done. The 21 Jac. 1, c. 19, s. 14, enacted that no purchaser for good and valuable consideration should be affected by an act of bankruptcy, unless the vendor should become a bankrupt within five years; but it was held that the lapse of eight years did not protect the assignment where the purchaser had notice (*Montford v. Ponten*, 1 Mont. 79, affirmed on appeal by Lord Lyndhurst). The point now raised is distinguishable from this decision. The enactment of James was merely to narrow the doctrine of relation, which injured innocent parties; whereas no one with notice of the act of bankruptcy could complain that the rule of law pressed hard upon him. It did not destroy any of the consequences of the act to the party committing it, but only lopped off some of its harsh consequences to others. The 88th section destroys *all* the consequences of the act to the party committing it—he can in no way be affected by it; and it can have no effect upon third parties. If this be correct, no transaction will be invalidated by reason of an act of bankruptcy, unless a fiat issues within twelve months. Where A., in 1828, conveyed the whole of his property to trustees in trust, to sell and pay his creditors, and in 1830 the trustees sold part of the estate to B., and A. joined with the trustees in conveyance to B., and in 1838 B. sold the purchased premises to D., who objected to his title on the ground that the conveyance of 1828 was an act of bankruptcy, but no commission had issued upon it; it was held, that the conveyance to B. was protected by 6 Geo. 4. c. 16, s. 86 (*Earl Granville v. Danvers*, 7 Sim. 121).

WARRANTS OF ATTORNEY, COGNOVITS AND JUDGES' ORDERS.

Warrants of attorney &c. within two months of bankruptcy.—By sec. 135 of the Consolidation Act warrants of attorney in personal actions (which does not extend to ejectments, *Doe v. Kingston*, 1 Dowl. N. S. 263), cognovit and judges order given within two months of the *filing* of the petition for adjudication are void. The section enacts that "every warrant of attorney to confess judgment in any personal action, given by any bankrupt after the commencement of this act, and within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every cognovit actionem or consent to a judge's order for judgment given by any bankrupt, at any time after the commencement of this act, and within two months of the filing of any such petition in any action commenced by collusion with the bankrupt, and not adversely, or purporting to have been given in an action, but having been in fact given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagements at the time of giving such warrant of attorney, cognovit actionem, or consent (as the case may be) shall be deemed and taken to be null and void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not."

Warrants of attorney and cognovits to be filed within twenty-one days.—Sec. 136, requires warrants of attorney in personal actions, and also cognovits to be filed within twenty-one days after the execution thereof, together with an affidavit of due execution, and this is so though judgment be entered up with the twenty-one days (*Acraman v. Hernaman*, 20 Law Journ. Q. B. 355). The following is the clause: "That if after the commencement of this act any warrant of attorney to confess judgment in any personal action, or any cognovit actionem, in any personal action, shall have been given by any such trader, and such warrant of attorney or cognovit actionem, or a true copy thereof, shall not have been filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench within twenty-one days next after the execution thereof, in manner and form provided by an act passed in the third year of the reign of his late Majesty King George the Fourth, intituled 'An Act for Preventing Frauds upon Creditors by Secret Warrants of Attorney to confess Judgment,' every such warrant of attorney and cognovit actionem shall be deemed fraudulent,

null, and void, to all intents and purposes whatever: and if any such warrant of attorney or cognovit actionem which shall be so filed as aforesaid shall have been given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or cognovit actionem shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such warrant of attorney or cognovit actionem shall be null and void to all intents and purposes whatever." The non-observance of the above enactments does not render the warrant of attorney, cognovit or judge's order void as against the trader himself, but only as against his assignees, in case of bankruptcy (*Bryan v. Child*, 5 Exch. 369; 19 L. J. 264, Exch.). As against the assignees, however, the judgment and execution are void, even though completed by sale by the sheriff to the execution creditor before the act of bankruptcy; and they may maintain money had and received against the execution creditor for the appraised value (*Bittleston v. Cooper*, 14 M. and W. 399; *Biffin v. Yorke*, 5 M. and G. 428).

Judges' orders obtained by consent to be filed.—The above provisions are extended to judges' orders in personal actions made by consent, authorising a judgment. This is by section 137 of the Consolidation Act which enacts that "every judge's order made by consent given after the commencement of this act by any such trader defendant in any personal action, and whereby the plaintiff in such action shall be authorised forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeasance or condition or not, in case the action in which such order shall be made shall be in the Court of Queen's Bench, or in case the action wherein the same is made shall be in any other court, a true copy of such order shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the said Court of Queen's Bench within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action and a cognovit actionem given by any defendant in any personal action, or copies thereof and affidavits of the execution thereof respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or cognovit actionem shall have been executed, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on

such judgment shall be null and void to all intents and purposes whatever; and the provisions respectively contained in the said act passed in the third year of the reign of his late Majesty King George the Fourth, intituled "An Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment," and in an act passed in the parliament holden in the sixth and seventh years of the reign of her Majesty, intituled "An Act to enlarge the Provisions of an Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment," for liberty to file warrants of attorney and cognovits actionem, or copies thereof, with the clerk of the docquets and judgments, and for the said clerk to make certain entries and search in relation thereto, and for entering satisfaction thereon, and for fees for search and filing and taking office copies, shall extend and be applicable to every such judge's order, in like manner as to warrants of attorney and cognovits actionem mentioned in the said acts."

There are a few more matters relating to the assignees which it will be desirable to notice in this place.

ACTIONS AND SUITS BY ASSIGNEES

Assignees may institute or defend actions or suits, and compound for debts due to the estate or refer to arbitration.—Formerly the assignees might have rightly commenced or defended an action without obtaining the consent of creditors; they should indeed for their own safety have obtained such consent before instituting a suit in equity, but though required by statute, it was held that the defendant could not set up the want of such consent. But the words in the Consolidation Act are much stronger than those in the former acts, and they expressly extend to the defence of suits as well as to the prosecution and defence of actions, and require the leave of the commissioner and not merely of the creditors. The 158rd sect. enacts that "the assignees, with the leave of the Court first obtained, upon application to such court, but not otherwise, may commence, prosecute, or defend any action at law or suit in equity which the bankrupt might have commenced and prosecuted or defended, and in such case the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate and effects of the bankrupt; and with like leave of the court, after notice to such creditors, and subject to such condition (if any) as to obtaining the consent of creditors, or any proportion of them, as the court shall think fit to direct, the assignees may take such reasonable part of any debts due to the bankrupt's estate as may by composition be gotten, or may give time or take security for the payment of such debts,

and may submit to arbitration any difference or dispute between the assignees and any other person for or on account or by reason of anything relating to the estate and effects of the bankrupt." With respect to actions and suits, the section speaks of those only which the bankrupt might have prosecuted or defended. As to arbitrations, the 154th sec. provides that "if the assignees shall agree in manner aforesaid to refer any matter in dispute to arbitration, such agreement of reference may be made a rule of any of her Majesty's superior courts of law at Westminster, whether such agreement contain a clause to that effect or not." The 15 & 16 Vic. c. 76, s. 142, provides "that the bankruptcy of the plaintiff in any action which the assignees may maintain for the benefit of the creditors shall not be pleaded in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal plead the bankruptcy."

Non-abatement of actions and suits by death or removal of assignees.—By sec. 157 of the Consolidation Act, "whenever an assignee shall die or be removed, or a new assignee shall be chosen, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he had originally commenced the same." By the 15 & 16 Vic. c. 86, s. 52, in the case of the abatement of a suit, an order may be made which is to have the effect of a bill of revivor (see 20 Law Tim. Rep. 231; 6 Law Stud. Mag. N. S. 89—92; 1 Chron. 332, 451).

Assignees commencing action before time to dispute bankruptcy has expired, the debtor may pay money into court.—By sec. 158 of the Consolidation Act, "if the assignees commence any action or suit for any money due to the bankrupt's estate before the time allowed for the bankrupt to dispute the bankruptcy shall have elapsed, the defendant may after notice to the assignees, pay the same or any part thereof into court, and all proceedings with respect thereto are thereupon to be stayed until such time shall have elapsed; and if within that time the bankrupt have not commenced such action, suit, or other

proceeding as allowed by this act, and prosecuted the same with due diligence, the money is to be paid out of court to the official assignee, but otherwise must abide the event of such action, suit, or other proceeding, and upon such event shall be paid out of court, either to the official assignee or the person adjudged bankrupt, as the court may direct; and after such payment of money so made into court the bankrupt cannot proceed against the defendant for recovery of the same money."

If adjudication annulled persons from whom the assignees have recovered, or who have bona fide paid the assignees are discharged from any claims by the bankrupt.—By sec. 155 of the Consolidation Act, "all persons from whom the assignees shall have recovered any real or personal estate, either by judgment or decree, are hereby discharged, in case the fiat be afterwards superseded, or the adjudication of bankruptcy, or petition for adjudication, be afterwards annulled or dismissed, from all demands which may thereafter be made in respect of the same by the person against whom such adjudication was made, and all persons claiming under him; and all persons who shall, without action or suit, bona fide deliver up possession of any real or personal estate to the assignees, or pay any debt claimed by them, are hereby discharged from all claim of any such person as aforesaid in respect of the same, or any person claiming under him, provided the persons so delivering up any real or personal estate, or paying any debt, shall not have had notice of an action, suit or other proceeding to dispute or annul the fiat or adjudication or petition for adjudication, and such action, suit, or other proceeding shall not have been commenced and prosecuted within the time and in manner allowed by this act." In *Smallcombe v. Olivier* (13 M. and W. 77), the effect of superseding or annulling the fiat for other than the want of legal requisites, was elaborately argued, and it was decided, in opposition to various dicta of Lord Eldon, that all acts done during the existence of the fiat were valid, and consequently debts, &c., paid to the assignees could not be recovered by the trader. According to that case, therefore, the notice specified in the proviso would be immaterial, where the annulment was on such ground.

If assignees commence an action or suit before the time allowed to dispute has expired, the debtor to the estate may pay the money into court.—By sec. 158 of the Consolidation Act, "if the assignees commence any action or suit for any money due to the bankrupt's estate before the time allowed for the bankrupt to dispute the bankruptcy shall have elapsed, any defendant in any such action or suit shall be entitled, after notice given to the assignees,

to pay the same or any part thereof into the court in which such action or suit is brought, and all proceedings with respect to the money so paid into court shall thereupon be stayed until such time shall have elapsed; and if within that time the bankrupt shall not have commenced such action, suit, or other proceeding as allowed by this act, and prosecuted the same with due diligence, the money shall be paid out of court to the official assignee, but otherwise shall abide the event of such action, suit, or other proceeding, and upon such event shall be paid out of court, either to the official assignee or the person adjudged bankrupt, as the court shall direct; and after such payment of money so made into court it shall not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money."

Evidence in actions and suits by and against assignees.—There are some provisions in the Consolidation Act as to evidence in actions and suits by and against the assignees, which will require to be noticed in this place.

Gazette evidence against bankrupt and his debtors if adjudication not disputed.—By sec. 233 of the Consolidation Act (as affected by the 17 & 18 Vic. c. 119, stated 1 Chron. p. 262) "if the bankrupt do not within a certain time effectually proceed to dispute the adjudication, the *Gazette* containing the advertisement of the bankruptcy will be conclusive evidence in all cases as against the bankrupt, and in all actions or suits by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit if he had not been adjudged a bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and filing of the petition for adjudication, and that such petition was filed on the day on which the same is stated in the *Gazette* to bear date." The following is the enactment, as modified, in full:—"if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within two calendar months after the advertisement of the bankruptcy in the *London Gazette*, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceedings to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or

suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the *Gazette* to bear date. This provision is imperative, and after the time specified the bankrupt cannot question the adjudication, either in the court of justices or by petition to the Lord Chancellor, or in any other way. The commencement of the action or suit will be the suing out the writ, the commencement of the proceeding by petition will be the presenting of the petition, although it may stand over, at the suggestion of the court (see exp. Thorold, 3 M., D. and D. 285; 1 Phill. 239; exp. Veysey, 3 M., D. & D. 425). As, for instance, where a petition to annul a joint fiat presented by one of the defendants, stood over for service on the other, although it was only sought to annul the fiat as regarded the petitioner (exp. Veysey). It must be an action which the bankrupt could have brought had no bankruptcy intervened (see *Kitchener v. Power*, 3 Ad. and E. 232; *Alsager v. Close*, 18 M. and W. 576); and therefore this section is not applicable in actions where the bankruptcy gives rise to the right of action, as in cases of fraudulent preference (*lb.*). Trover and detinue are both within this section. In an indictment against the bankrupt and others, the *Gazette* is only evidence against the bankrupt, and it is necessary to prove, as a condition precedent to putting it in, that the bankrupt has not taken the steps mentioned. The question of the sufficiency of such preliminary evidence is one of law for the judge to decide. The production by the registrar of the court of the books containing the entries and minutes of the proceedings relative to the bankruptcy, and the absence therein of all reference of any such step having been taken by the bankrupt, together with the evidence of the solicitor to the fiat, that he had no knowledge of any action having been brought to dispute the fiat, was held sufficient (*R. v. Harris*, 4 Cox's C. C. 140). The Isle of Man is not within the United Kingdom, and a person residing there has three months within which he may contest the validity of the adjudication (*Davison v. Farmer*, 6 Exch. 242).

No proof required at trial at law of requisites to support adjudication.—By sec. 234, in certain actions by or against any person acting under the bankruptcy, no proof is to be required at the trial of the petitioning creditor's debt, trading or act of bankruptcy, unless notice disputing the same be given at a specified time (see particularly, 1 Law Chron. 131, 132). "That in any action, other than an

action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the court, for anything done under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, unless the other party in such action shall, if defendant at or before pleading, and if plaintiff before issue joined, give notice in writing to such assignees or other person that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may (if he think fit) grant a certificate of such proof or admission; and such assignees or other person shall be entitled to the costs occasioned by such notice, and such costs shall, if such assignees or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignees or other person." The above section does not apply to a feigned issue, or *semble*, to an issue under sec. 15 (Lott v. Melville, 3 M. and G. 40). Where the assignees are plaintiffs at common law, there must be a plea denying their title as well as a notice (Buckton v. Frost, 8 A. and E. 845). When given by a defendant, it is not considered as a part of his case at the trial, but he may prove the service of it, as soon as the assignees attempt to make out a *prima facie* case, by producing the fiat &c. (De Charme v. Waine, 2 Camp. 324). The notice must specify what part of the proceedings the defendant disputes; a notice of intention to dispute "the bankruptcy" being too general (Trimley v. Uwins, 6 B. and C. 537). And the proof is strictly limited by the notice, so that, on a notice to dispute the act of bankruptcy, it is not necessary to prove a trading or petitioning creditor's debt (Porter v. Walker, 1 M. and G. 686). If the notice be of an intention to dispute the act of bankruptcy only, and depositions are read to prove the trading and petitioning creditor's debt, this does not put the whole proceedings in evidence; if the opposite party wish to inspect other depositions, he must call for them as part of his case (Bluck v. Thorn, 4 Camp. 191; Whitfield v. Alan, 2 C. and K. 1015). The certificate must be granted by the judge before whom the cause is tried.

No proof required at hearing in equity to support requisites.—A similar provision is made with regard to suits in equity (see *ante*, pp. 92, 93) by sec. 235,

which enacts that "in all suits in equity by or against assignees (except suits by assignees for a debt or demand for which the bankrupt might have sued, which are provided for by sec. 233, *suprà*), no proof shall be required at the hearing, of the petitioning creditor's debt, or of the trading, or act of bankruptcy, as against any parties in such suit, except such parties as shall, *within ten days after* [the cause is at issue, 1 Chron. 92], *rejoinder* [there is now no rejoinder in equity]; give notice in writing to the assignees of his or their intention to dispute some and which of such matters (Bell v. Tinney, 4 Madd. 372; 2 Glyn and Jam. 245; Bevan v. Lewis, 1 Sim. 376)."

Proceedings in bankruptcy purporting to be sealed, receivable in evidence.—By sec. 236, "any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof, and no such document or copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided: provided always, that all fiats and proceedings under the same which may have been entered of record before the passing of the act passed in the Parliament holden in the second and third years of the reign of his late Majesty King William the Fourth, intituled "An Act to amend the Laws relating to Bankrupts," or purporting to have been sealed before the commencement of this act with the seal of the Court of Bankruptcy theretofore in use, or a writing purporting to be a copy of any such document, and purporting to have been so sealed, shall and may upon the production thereof, and in the case of any fiat or proceedings entered of record before the passing of the last-mentioned act, with the certificate thereon, purporting to be signed by the person duly authorised to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place, anything hereinbefore contained notwithstanding."

Judicial notice of signature of commissioner or registrar, and seal of court.—By sec. 237, "all courts, judges, justices, and persons judicially acting, and other officers, shall take judicial notice of the signature of any commissioner or registrar of the court, and of the seal of the court, subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this act."

Evidence of declaration of insolvency.—By sec. 238, "a copy of a declaration of insolvency under this act, purporting to be certified by the lord chancellor's secretary of bankrupts [office abolished, 1 Chron. 8], or any of his clerks as a true copy, shall be received as evidence of such declaration having been filed." By 15 & 16 Vic. c. 77, s. 6, this is to be certified by the chief registrar or any of his clerks.

Copy of petition &c. under the English or India Insolvent Debtors Act to be admitted in evidence.—By sec. 239, "a copy of any petition filed in the court for the relief of insolvent debtors in England, or in any court for relief of insolvent debtors at Calcutta, Madras, Bombay, or at the settlement of Prince of Wales Island, Singapore, and Malacca, and of any vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication or other order or proceeding, and appearing to be sealed with the seal of such court, shall at all times be admitted under this act as sufficient evidence of the same, and of such proceedings respectively having taken place, without any other proof whatever given of the same."

Advertisements, when evidence.—By sec. 240, "a copy of the *London Gazette* and of any newspaper containing any such advertisement as is by this act directed or authorised to be made therein respectively shall be evidence of any matter therein contained, and of which notice is by this act directed or authorised to be given by such advertisement; and all proceedings or notices required by this act to be inserted in the *London Gazette* shall be marked with the seal of the court from which such proceedings or notices shall be issued and certified by one of the registrars of the said court."

Provisions of evidence act to be applicable to bankruptcy matters.—By sec. 241, "the provisions of an act passed in the Parliament holden in the sixth and seventh years of the reign of her present Majesty, intituled, 'An Act for improving the Law of Evidence,' shall be applicable to any matter or proceeding in prosecution under the provisions of this act, and to any matter, question,

or inquiry, arising in any court of law or equity out of or consequent upon any such matter or proceeding." The 14 & 15 Vic. c. 99, and 16 & 17 Vic. c. 83, have carried the law of evidence still further.

Death of witness—Depositions evidence.—By sec. 242 "in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any bankruptcy heretofore or hereafter, or under any petition for arrangement, the deposition of any such deceased witness, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall in all cases be received as evidence of the matters therein respectively contained."

Limitation of actions—General issue.—By sec. 159, "every action brought against any person for anything done in pursuance of this act shall be commenced within three months next after the fact committed; and the defendant in any such action may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time limited as aforesaid for bringing the same, the jury shall find for the defendant; and if there be a verdict for the defendant, or if the plaintiff shall be non-suited, or discontinue his action or suit after appearance thereto, or if upon demurrer judgment shall be given against the plaintiff, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any such action as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer." This will not include actions against the assignees, either official or general, in respect of the property of the bankrupt, for they are considered to act by virtue of the authority flowing from the right of property, not of any special authority under the act (see *Knight v. Turquand*, 2 M. and W. 101). Thus an action against them for improperly entering the premises of a third person to seize the bankrupt's goods, would not be within this section (*Edge v. Parker*, 8 B. and C. 697), or for seizing the goods of a third party upon the premises of the bankrupt (*Carruthers v. Payne*, 5 Bing. 270). The meaning of the words "in pursuance of the act," is, if the person *bona fide* believes that he is acting under the statute. The apparent difference in some of the decisions will be reconciled by examining the particular circumstances. The absence of all reasonable

ground for such a belief would of course be an ingredient in determining, that there was no *bona fide* belief (*Booth v. Clive*, 20 L. J., C. B. 150; *Horn v. Thornborough*, 8 Exch. 846).

EDUCATION OF ARTICLED CLERKS.

(*ante*, p. 325—328).

Gentlemen,—If your doubts as to the insertion in your last number of the communication of "An Articled Clerk" under this head, had only assumed a mere decided form before consigning the manuscript to type, and you had acted upon what I think should have been your original determination, not to have sent forth to the world such a specimen of the views and feelings of articled clerks, some, at least, of your readers would have been relieved of what it is impossible not to feel on reading it, as well as spared the perusal of a contribution not likely to raise articled clerks in the estimation of the public. Judging from your correspondent's assertions, and representations, it would appear that the present race of articled clerks are far more solicitous of studying the appendages, and the choicest and pleasantest situations of their offices, and the readiest means of avoiding the performance of what they consider the drudgery of their duties, (but in reality as essential to learn as any other part of their business) combined with an undue appreciation of, and regard for, their own, particular and valuable selves, together with extensive ideas of the kind and benignant interest which they imagine should be exhibited for them and their services, than of acquiring a perfect knowledge of that profession on the proper, intimate, and practical acquaintance of which the interests of so many individuals depend. I consider it quite clear that an impression of this kind tends very much to lower articled clerks in their professional *status*. For my own part, I am careless as to what extent these notions are entertained by your correspondent, and a few others doubtless possessing a similar inaptitude to his for learning their profession, and I would say, let them enjoy such notions in peace. But that which I most desire to protest against, is the thought, conveyed by your correspondent's remarks, that *all* articled clerks are influenced by these fancied grievances and wrongs, and that *all* possess the unenviable feelings given utterance to, by him in your pages: no doubt there may be a portion who think in this way, but I do not suppose I am wrong in saying that the majority would join me in deprecating what he has written, and in raising one common voice to condemn the unjust imputations cast upon attorneys, a body of men who (of course with some exceptions, and

to what body I would ask are there not these exceptions) are an honour to the profession to which they belong; and I verily believe there will not be found among the entire class of articled clerks many to respond to the spirit of his communication, indeed so very apparent is the utter worthlessness of the sentiments and feelings expressed, that had it not been for your note I should really have thought you had given publicity to it, merely for the purpose of exposing the writer to the ridicule and contempt he so richly merits. It is not at all probable that you will be called upon to insert rejoinders on the score of the absurd and groundless charges brought against solicitors, as they are too palpably untrue to cause more than a feeling of pity for the wrong *animus* of the asserter of them. Solicitors generally know how to treat their clerks (both articled and unarticled) and I dare say if your intelligent and apparently extremely intellectual correspondent had shewn much disposition himself to possess a knowledge of the law, such a disposition would not have been neglected or discouraged; but even if it had been so, surely it is not for him to say that this would have been sufficient to deter any ordinarily clever clerk or one interested in his profession from pursuing it without the assistance of his master, and if he were not gifted with sufficient perseverance and intellect to accomplish this, why then the sooner he quitted his profession the better, for any amount of diligence and attention in a master would not be of much avail to teach him it, or to afford him a proper legal knowledge, if he had not in him the mind and the will to apply himself to it. In what way, I would ask your correspondent, have our greatest and cleverest legal characters, including a number of the chancellors, attained a knowledge of their profession and its grand and noble principles? Was it through the instrumentality or personal exertions of any with whom they were connected in their studies, or the encouragement they received from those in the position to give it? The answer is apparent, it was not. Each by his own untiring zeal and perseverance arrived at that eminence to which his innate talent had led him to aspire, thus obtaining the reward of his diligence and self-exertions. And I do not suppose that any of them considered it necessary to find fault with his office, or to indulge in a passing thought of his superiority over, or dread of intercourse with, the copying clerks when it was their duty to come into contact in the course of business; preferring also, for the purposes of study, the despised office desk of your correspondent "hewed, hacked, and adorned with many a strange device," to even that of a study table surrounded with all the elegant adornments

of refined life, knowing full well that the pursuit of knowledge does not require either ease or elegance to render it interesting to minds fitted for its reception. Coming to what appears to be the keystone of this elaborately erected edifice of learning and information—the place for the formation of a college for articled clerks.—I would observe that I think his chimerical scheme quite incapable of being carried out, and like his communication would have been far better left in the cells of his own imagination than gracing (!) the columns of THE LAW CHRONICLE. His plan and exertions in furtherance of it, appear directed to the establishment of a very pleasant, comfortable college or society, where men not particularly anxious to distinguish themselves in the legal world or to acquire more than the name of lawyers, might, if they were so disposed, amuse themselves for a certain number of years without performing the *drudgery* consequent, of course to them, on the usual service, afterwards obtain the necessary *cpm*, and ultimately be foisted upon the public as fit and proper persons to instruct and advise in all legal matters. In conclusion, I would certainly recommend your correspondent, rather than attempt to disseminate his idle vagaries among his fellow clerks, to retire altogether from that which appears to be so distasteful to him, and leave the dull and dry routine of an attorney's office for abler minds than his to engage in; ever regretting that it was his misfortune to be so nearly allying himself to a class of persons seemingly far beneath his standing, and withal of the race "*penes vulgus*."

ANOTHER ARTICLED CLERK.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ANNUITY.—*Interest on arrears.*—The only cases in which interest is now allowed by courts of equity (in the absence of express contract) on the arrears of an annuity are, where the annuitant has held legal security which, but for the interference of the court, he might have made available for the obtaining of interest, or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay. *Torre v. Brown*, 26 Law Tim. Rep. 129.

ANNUITY.—*Priority over other charges given by will.*—A testator who died in 1828, by his will directed his trustee to invest so much money as would produce an annuity of £120 per annum, and to pay £120 a year to his widow until such time as therein mentioned, when the £120 annuity was to be increased to £250; and after her decease to pay

£1000 part of the money invested to meet the annuity, as she should by will appoint; and in default of such appointment to her next of kin. And he gave other legacies, and disposed of the residue. The testator's estate at his death was only sufficient to pay his debts and funeral expenses; his executor subsequently received £1000 as part of his estate; the widow received only £40 on account of her annuity, and died intestate in 1850: Held, that her administrator was entitled to have the £1000 applied in priority to the satisfaction of the arrears of her annuity. *Ingleman v. Worthington*, 26 Law Tim. Rep. p. 253.

CHAMPERTY.—*Contract to advance money to carry on suit.*—In a suit in the Irish courts a case of champerty has been sustained, which is of interest to professional men. Money was advanced on the security of a bond, with warrant to enter judgment thereon. The purpose to which the money was applied, was in carrying on a suit by a person claiming a wife's share of her deceased alleged husband's property, and the bond was also to stand as a security for further money advances for the same purpose: Held, that this contract was illegal on the ground of maintenance. *Clark v. M'Nally*, 27 Law Tim. Rep. 45.

CHARITY.—*Gift to, only on the happening of a particular event—Resulting trust.*—Land was vested in trustees, upon trust, to erect buildings upon it, and to 'permit' the same buildings, ground and premises to be used as a pesthouse for the relief of the poor of certain parishes, as should at any time thereafter be visited with the plague, and for a burial-place for persons dying of the plague, and for no other use, intent or purpose whatsoever, and by and out of the rents and profits, from time to time, to maintain and keep in repair the said buildings: Held, that an immediate and continuing trust as to the whole property was created, not limited, in any respect, to the time of a visitation of the plague, and, therefore, that there was no resulting trust in favour of the heirs of the donor until the appearance of the plague. *Attorney General v. Earl Craven*, 27 Law Tim. Rep. p. 23; Week. Rep. 1855-6, p. 340.

DEVISE.—*Copyholds—Equitable interest in Copyholds passing by general words of Devise.*—Before the statute of 1815 (55 Geo. 3. c. 192), dispensing with the necessity of a surrender of copyholds, a general devise of lands, where the deviser had a mere equitable interest in copyholds, did not pass such copyhold interest, unless there was in the will some indication of intention *ultra* the general words of devise. But now, since, according to *Doe v. Ludlam* (7 Bing. 275), explaining that statute, general words do include unsurrendered legal

copyholds, courts of equity will probably follow the same rule in the case of trusts of copyholds. *Torre v. Brown*, 26 Law Tim. Rep. p. 129.

DEVISE.—*Construction—Executory devise—Void condition.*—A condition or contingency repugnant to the estate devised is void, and this is so, as well in the case of real as of personal estate. Thus, a devise to one in fee, upon condition that he shall not alien, is void (Co. Lit. 223). So a devise in fee, upon condition that the wife shall not be endowed, or the husband be tenant by the curtesy, is void, because repugnant to the estate devised (*Mary Portington's case*, 10 Rep. 38; *Sir Anthony Mildmay's case*, 6 Rep. 41, a.): So, feoffment in fee, upon condition that the feoffee's daughters shall not inherit, is void, because repugnant to the nature of the estate. A devise to a man in fee, upon condition that his heirs shall not take by descent, unless he specially appoint them, is a void condition, and consequently the devise subsisting on that condition, is void. In the case of *Muschamp v. Bluet* (Bridg. 135) upon conference between the judges, Willes, C. J., and Abney, J., changed their opinions, and adopted that of Burnett, J. This case and *Ware v. Cann*, (10 Barn. and C. 439) were also decisions upon real estate and are sufficient to show that there is no distinction between real and personal estate with respect to the above rule. The principle is this: the law said, that if an owner of property died intestate, his real property should go to his heirs, his personalty to his next of kin; and any devise over to contravene this rule is repugnant to law. These remarks will prepare the reader for the following decision: A testator gave real and personal estate upon trust for his son, to vest in him on his attaining twenty-one years; and by a subsequent clause in his will he directed that in case his son should not live to attain twenty-one, or having attained that age should not have made a will, then the property should be in trust for the defendants. The son attained the age of twenty-one, and died intestate: Held, that the property, both real and personal, vested in the son absolutely, and that the devise over was void, as being repugnant to the absolute interest given to the son. *Holmes v. Godson*, Week. Rep. 1855-6, p. 415, and 27 Law Tim. Rep. 9.

EXECUTORS.—*Leaseholds, sale of—Executors—Indemnity—Not where testator assignee.*—Where leaseholds, of which the testator was lessee, have been specifically bequeathed, or form part of the residue of the testator's estate, the executors are entitled to indemnity out of the general estate against liability on the covenants, if the leaseholds do not afford, or the legatee cannot give, a sufficient indemnity. Where leaseholds, of which the testator

was lessee, have been sold by the direction of the court, the executors are still entitled to indemnity. Where leaseholds, of which the testator was assignee, have been sold, there are no future liabilities against which the executors can require indemnity. *Garratt v. Lancefield*, 2 Jur. N. S. 177.

FAMILY ARRANGEMENTS [vol. 1, pp. 87, 338].—*Father and son—Resettlement of estate, unreasonable provisions—One solicitor employed for both parties—Departure from proposals.*—The exercise of parental influence is inseparable from transactions between father and son, and is not a sufficient ground for invalidating a family arrangement, unless it appears that such influence has been exercised to benefit the parent. Though cases of the resettlement of property as between parent and child are regarded with jealousy (*Twedell, Turn. and R. 18*), yet if the resettlement be not obtained by misrepresentation or suppression of the truth; if it be one in which the father acquires no personal benefit, and in other respects be a reasonable one, it will be supported, even though the father did exert parental authority and influence over the son to procure the execution of it (*Hoghton v. Hoghton*, 15 Beav. 278). Where, in the opinion of the court, a new settlement, considering all the provisions together, was not unduly favourable to the father, and not, in other respects, improper, the court refused to set aside the transaction, although the family solicitor had acted for all parties in the transaction, and though it appeared that the deeds actually executed by the parties were in some respect not in accordance with the proposals for the settlement which had been agreed upon, the alterations having been made by the directions of the solicitor, without the knowledge or sanction of either party, after the deeds had been approved. *Hartopp v. Hartopp*, 27 Law Tim. Rep. 37.

FEME COVERT.—*Equity to settlement* [vol. 1, pp. 9, 87, 200, 272, 372.] *Previous provision.*—There is a very large discretion resting with the court of equity upon questions relating to a married woman's equity to a settlement, it being really impossible to extract any general rule from the authorities, the amount depending on the circumstances of each particular case. Where the husband has received no part of his wife's property, in general one-half only is given to the wife. If the husband has misconducted himself, or deserted his wife, thus throwing upon her the whole burden of maintaining herself and her family, according to the earlier authorities the court gives her the whole income. The question resolves itself into this:—What is the proportion to be allowed to the wife in addition to one-half? Nothing can be more reasonable than to look at the whole state of the wife's property, and what benefit the

husband has derived therefrom, and whether he had given an equivalent in the shape of a settlement upon his wife for what he may have received. These rules or doctrines were applied in the following case: A., a married woman, was entitled upon her marriage to £2700, of which her husband received £2000, the remainder being settled upon herself. The husband's mother settled certain property upon her son for life, with remainder to A. during her life. Certain property had also been settled upon A. for her separate use by her own mother. A. had been deserted by her husband who had otherwise misconducted himself towards her. Subsequently to this desertion, she became entitled to nearly £1200:—Held, that the assignees for value of the husband were entitled to £250 out of this fund, the residue being settled upon A.; each party paying their own costs. Notwithstanding gross misconduct by the husband, the court will not throw out of consideration any previous provision made for the wife, and the amount of her fortune which he has received. *Aubrey v. Brown*, Week. Rep. 1855-6, p. 425.

INFANT.—*Money paid by infant under contract not recoverable back—Proof in bankruptcy after disaffirming contract.*—Although an infant is not absolutely bound by a contract, not being a contract for necessities, and cannot be compelled to pay money under it, yet if he does pay money under it, he cannot in general recover it back when he comes of age. In a case, therefore, where an infant paid down £1500 as the consideration for being admitted into a partnership, and acted as a partner for some time, but afterwards disaffirmed the partnership both before and upon his coming of age: Held, that he could not by action have recovered the £1500 from the other partners, and that, therefore, he had no right of proof against their estate under their bankruptcy. *Exp. Taylor, re Burrows*, Week. Rep. 1855-6, p. 305; 2 Jur. N. S. 220.

INJUNCTION.—*Money in bank alleged to be embezzled—Payment to attorney of sum for defence.*—A person having been accused of embezzling money from his employer, and having certain sums of money lodged in his own credit in a bank, an injunction was granted upon petition, restraining the officers of the bank from paying out this money to the accused, the petition alleging that it was the money of the employer. An order was now made, upon motion, directing the payment of £80 out of these sums to the attorney of the accused, for the purpose of defraying the expense of the defence of the accused upon the criminal charge—the attorney undertaking to account for same if called on by the court to do so. *Allen v. M'Kenna*, 27 Law Tim. Rep. 46.

LEASE.—*Covenant against trade—School—Injunction—Interest of reversioner.*—A bill by a person

interested in reversion expectant upon the death of tenant for life, to restrain the carrying on of a ladies' school upon property demised for a long term, as a breach of a covenant contained in the lease against carrying on any trade, or using the property otherwise than as private dwelling houses:—Held, that the plaintiff, as a reversioner, could not restrain the defendants without proving that special damage had been sustained, although, if in possession, he would be entitled to have the covenant strictly performed without inquiry as to the amount of damage arising from the breach of it. *Johnstone v. Hall*, Week. Rep. 1855-6, p. 417.

POWER.—*Will—Execution of power—Power to survivor—Time from which will speaks—Wills Act, sec. 24.*—By sec. 24 of the 7 W. 4, and 1 Vic. c. 26, it is enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Personalty was settled upon such trusts as the survivor of A. and B. should at any time or times after the decease of the other of them by deed or will appoint. In 1846, A., during the life of B., made a will, purporting to exercise this power. A. survived B., and died without having republished his will:—Held, that the will did not operate as an execution of the power, and that the 24th section of the Wills Act had no bearing on the case. *Cave v. Cave*, 2 Jur. N. S. p. 295.

POWER.—*Will—Appointment to grand children—Under power to appoint to children and their heirs.*—The word "heirs," may be used as *designatio personarum*, or as a word of limitation of estate; though the word is most frequently used in the latter sense, yet there are numerous instances, particularly in executory documents, where it is used in the former sense. In *Trevor v. Trevor* (1 House Lords Cases 239), it was held that the words "in tail male" were descriptive, not of particular issue, but of the interest which issue were to take; but there are many cases in which it is necessary to read the word as *designatio personarum*. It was so read in the following case:—A testator devised freehold estates to C. for life, with remainder to such one or more of his children and their, his or her heirs, for such estate and estates, and in such part and in such manner and form as C. should appoint:—Held, that an appointment to a grandchild of C. was authorised by the power. *Fowler v. Cohn*, Week. Rep. 1855-6, p. 412; 27 Law Tim. Rep. 25.

POWER OF SALE.—*With consent of tenant in possession—Acceleration by surrender of previous life estate.*—It seems to be, if not settled law, yet the

far better opinion, and one which would be acted upon, that where life estates are given to two or more persons in succession, with remainders over, and a power is given to the second tenant for life, on becoming entitled in possession, to charge the estate, this power cannot be exercised by the first tenant for life surrendering his life estate in order to accelerate the second estate for life; and the reason given in Sugden on Powers (p. 389, 7th edit.) is, that such a proceeding might be adopted in order to defraud the person entitled in remainder; and it is laid down in that work that the estate cannot be charged unless the second life estate comes into possession in the ordinary way; for the result might be, that the second tenant for life might die in the lifetime of the first tenant for life, and that the estate would be burdened with a charge which was never contemplated by the testator in the events which had happened. But it is impossible that any result analogous to this could occur in the case of a power of sale or exchange; and in the following case it has been decided that the rule does not apply to a power of that description:—Where a testator devised an estate, to which he was entitled in fee in remainder after the life estate of his mother, to trustees upon trust for his wife for life, with remainders over: and he gave power to trustees, with consent of any tenant for life or in tail, entitled in possession for the time being, to sell the estate, and to re-invest the proceeds; and the testator's mother, who survived him surrendered her life estate to the widow, in order to enable the trustees to sell: Held, that the trustees might exercise the power of sale with consent of the tenant for life in possession. *Truell v. Tyssen*, 27 Law Tim. Rep. 25.

PUBLIC COMPANY.—*Railway company—Purchase-money paid into court for copyholds allowed to be applied in the enfranchisement thereof—Costs of enfranchisement.*—In the case of Cheshunt College (1 Jur. N. S. 995), V. C. Wood held that an enfranchisement was, in fact, such a purchase of other hereditaments as might fairly come within the operation of the Lands Clauses Act. A railway company paid purchase-money of some copyhold property into court under the 78th section of the Lands Clauses Consolidation Act. The property so purchased, together with other copyhold lands, had been enfranchised. A petition was presented praying payment out of court of the purchase-money; application of it to the purposes of the enfranchisement, and payment by the company of the costs of such enfranchisement, so far as related to the land purchased by them: Held, that the enfranchisement of the copyhold land taken by the company amounted to an investment of the purchase-money in other

lands, and the company must pay the costs of such enfranchisement. *Dixon v. Jackson*, 27 Law Tim. Rep. 58.

PUBLIC COMPANY.—*Railway acts, construction of—Right to restrain purchasers under parliamentary powers from exercising rights of property beyond the purposes contemplated by the acts.*—The rights incident to an estate in fee simple, which Parliament compels a landowner to give, are restricted by the terms of the legislative contract, and are qualified by the circumstance that the estate was compulsorily given to effect a specified purpose of public benefit. *Bostock v. The North Staffordshire Railway Company*, Week. Rep. 1855-6, p. 356; 27 Law Tim. Rep. 33.

PUBLIC COMPANY.—*Waterworks Clauses Act, 1847—Lands Clauses Consolidation Act—Taking stream.*—The Waterworks Clauses Act, 1847, places the taking of streams upon the same footing as the taking of lands under the Lands Clauses Consolidation Act, and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first paying compensation for the same, or making deposit and giving a bond in accordance with the provisions of the Lands Clauses Consolidation Act. *Ferrand v. The Mayor, Aldermen, and Burgesses of Bradford*, 2 Jur. N. S. 175; Week. Rep. 1855-6, p. 350.

TRUSTEE.—*Defaulting trustee—Loss from improper investment—Recopying—Tenant for life—Trafford v. Boehm*, 3 Atk. 444, considered.—In the following case it was attempted to be argued that when a cestui que trust requests his trustee to lay out the trust-fund in other securities than those upon which they ought to be invested, that the trustee, whatever character the transaction may assume, may say to the cestui que trust that he shall be bound to indemnify the trustee from the consequences of that act, and shall give to the trustee an indemnity from all loss. It is obvious that the temptation already existing to induce trustees to commit such breaches of trust would be greatly increased by their having rights against persons having limited interests in the trust-funds and the general proposition contended for is only to be found in the case of *Trafford v. Boehm* (3 Atk. 444). All the subsequent cases go upon this ground, that the trustee has a right against the cestui que trust only to compel him to refund, when the cestui que trust has been active in the misappropriation; but the general proposition above put forward was not even mentioned in the decisions in *Montford v. Cadogan* (17 Ves. 485; 19 *Id.* 685) or of *Raby v. Ridalgh* (1 Jur. N. S. 863; 3 Eq. Rep. 904), and it seems to be very doubtful if it was ever mentioned in *Trafford v. Boehm* (*supra*). It is very difficult to say from the

report what was the case made by the cross-bill by Charles Boehm. In the following case it was decided, where a trustee, with the assent of the cestui que trust having a life interest in the trust-funds, lends the trust-money upon a security, which being insufficient, the trust-fund is wholly lost, the trustee being compelled to refund the trust-moneys cannot maintain a suit against the assenting cestui que trust to compel him to indemnify the trustee. *Brown v. Mansuett*, 27 Law Tim. Rep. 45.

TRUSTEES.—*New trustee*—*Trustee Act 1850*—*Infant trustee*.—Where a trust for sale was created, but one of the trustees was an infant: Held, that a new trustee might be appointed under the Trustee Act (sec. 32), in the place of the infant trustee, and the vesting order might be made in favour of the adult and new trustee. *Re Porter's Trusts*, 27 Law Tim. Rep. 26.

USURY [vol. 1, 150, 201, 212, 448].—*Judgment*—*Warrant of attorney*—*Lane v. Horlock*, [vol. 1, p. 212]—*Security on land*— 3 & 4 Will. 4, c. 37; 2 & 3 Vic. c. 37.—Although the usury statutes have been repealed (1 Chron. p. 150) yet the provisions of the repealed acts will long require the attention of the practitioner in respect of past transactions, and as we have before (vol. 1 p. 212) referred to the case of *Lane v. Horlock*, as decided by V. C. Kindersley, we have now to call attention to the decision in that case of the House of Lords overruling V. C. Kindersley. It appears that the latter proceeded on the 2 & 3 Vic. c. 37, and not on the 3 & 4 Will. 4, c. 98, and so far the Lords seem to have agreed that they should have come to the same conclusion, but it was unnecessary to decide that point, as they held that the 3 & 4 Will. 4, c. 98 was the statute applicable. The 7th sec. of this latter statute enacted, that "no bill of exchange or promissory note made payable at three, or within three months after date, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any such bill or note be affected by reason of any statute or law in force for the prevention of usury." In the case of *Lane v. Horlock*, the advances made by Lane, were on bills of three months, as will appear from the following statement:—Money was advanced by Lane to Horlock on his acceptances at three months, bearing interest at £10 per cent., for which subsequent acceptances were given. A warrant of attorney to confess immediate judgment was given to secure the payment of these acceptances, which judgment was entered up the following day. Horlock was possessed of real estate of considerable value, but heavily

encumbered. Lane required to be furnished with the particulars of Horlock's estate and its incumbrances before he would lend the money, which he investigated, but no reference was made to the estate in the warrant of attorney, or in any agreement between the parties: Held, reversing the decision of the court below, that the transaction was not void for usury, but was protected by the 3 & 4 Will. 4, c. 98, s. 7, *Semble*, per the Lord Chancellor, it would (notwithstanding the decision of Wightman J. in the same case, reported 4 Dowl. and L. 408, and following the judgment of Patteson J. in *Withy v. Gilliard*, 4 *Id.* 408, n.) have been void but for that statute under the 2 & 3 Vic. c. 37, the warrant of attorney, under the circumstances, being a device to charge the land. *Lane v. Horlock*, 2 Jur. N. S. 289; Week. Rep. 1855-6, p. 408.

VOLUNTARY CONVEYANCES [1 Chron. pp. 167—170, 804].—*Fraudulent assignment*—*Stat. 13 Eliz. c. 5*—*Acquiescence of creditor*.—A debtor, with the knowledge of his creditor, made a voluntary settlement of a portion of his estate. The creditor became the executor of the debtor, whom he survived nine years, and during that time he took no steps to dispute the validity of the settlement: Held, that the executors of the creditor were not entitled to set aside the settlement as fraudulent. *Oliver v. King*, Week. Rep. 1855-6, p. 382; 27 Law Tim. Rep. 29.

EQUITY PRACTICE.

ANSWER.—*Discovery*—*Penalties*—*London broker*.—A person who holds himself out as a broker of the city of London, and is employed by a person who believes him to be such, cannot, when sued by his principal for an account of his transactions as such broker on the principal's behalf, protect himself from discovery, on the ground that it may render him liable to penalties for having acted as a broker without having been duly admitted as such. Whether it would make any difference that the principal at the time of employing the broker knew that he was not duly admitted, *quære?* *Robinson v. Kitchen*, 2 Jur. N. S. p. 294; Week. Rep. 1855-6, p. 344.

ANSWER.—*Refusal to answer interrogatories*—*Exceptions*—*Fraudulent conveyance*—*Acquiescence in refusal to answer*.—In *Ovey v. Leighton* (2 Sim and Stu. 284), it was held that after acquiescing in the defendants' refusal to answer the original bill, the plaintiff could not insist on an answer to the same interrogatories. This decision has been followed by the Master of the Rolls; to a bill to set aside a conveyance as fraudulent and void under 13 Eliz. c. 5, a defendant put in an answer declining to answer the interrogatories, on the ground that he might be exposed to penalties under the statute. The plain-

tiff amended his bill by striking out all express allegations of fraud, and adding a statement that the defendants alleged, and he (the plaintiff) admitted, it might be true that none of the acts done were such as to expose the defendant to penalties. The facts on which it was sought to set aside the deed were set out as before. To this bill the defendant by answer insisted that he was not bound to answer the interrogatories, which were the same as to the original bill. Exceptions to the second answer were overruled. *Wick v. Parker*, Week. Rep. 1855-6, p. 452.

COSTS.—*Specific performance—Renewal of lease Suit necessary from absence of leasing power.*—The costs of a suit for the specific performance of a covenant for the renewal of a lease must be paid out of the personal estate of the deceased covenantor when, by reason of the limitations contained in his will and the omission therefrom of a proper leasing power, such renewed lease could not be granted without the assistance of the court. *Wortham v. Lord Dacre* Week. Rep. 1855-6, p. 451.

EVIDENCE.—*Notice of using at hearing affidavits previously filed*—15 & 16 Vic. c. 86—*Applying for hearing to stand over.*—The 38th section of the 15 & 16 Vic. c. 86, specifies the mode in which evidence is to be closed (and see order, 1 June, 1854; 1 Chron. 37). "The evidence on both sides in any suit in the said court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined, as shall in that behalf be prescribed by any general order of the Lord Chancellor, but with power to the court to enlarge the same if it shall see fit; and after the time fixed for closing the evidence, no further evidence, whether oral or by affidavit shall be receivable without special leave of the court, previously obtained for that purpose." Knight Bruce, L. J. has expressed his opinion on the above section to the effect that the words "without special leave previously obtained," mean without leave previously obtained on a special application to the court made for that purpose, founded on special circumstances, to satisfy the court that it ought to exercise the discretion reposed in it. By the general practice of the court as founded on the 38rd order of Aug. 1852, the evidence pled on an interlocutory application cannot be used on the hearing, except upon a special application made within due time after closing the evidence. The court has power to enlarge that time, but it must be by a motion with special notice. Therefore, where the plaintiffs gave notice to the defendants, four days after the time for closing the evidence, of their intention to read, at the hearing of the cause, certain affidavits used on an interlocutory application, and proceeded at the hearing to read the same, but the defendant objected to their being read

and his objection was allowed. The plaintiffs thereupon moved that the cause might stand over until the following day, and that the court would give special leave to them to read the affidavits or to allow them to examine orally witnesses who were then in court, under the 15 & 16 Vic. c. 86, s. 38: Held, that as the plaintiffs neglected to make an application within due time for special leave to read the affidavits at the hearing, and as there were no special circumstances in the case, the court could not accede to the application. 15 & 16 Vic. c. 86, s. 38, does not give the court a discretion in such a case as the present. *Evans v. Coventry*, 27 Law Tim. Rep. 39.

EVIDENCE.—*Clerk to commission.*—The evidence of a clerk to a commission to examine in a suit, and who has been examined *de bene esse*, will be admitted on behalf of the plaintiff, saving just exceptions. *Lord v. Colvin*, Week. Rep. 1855-6, p. 455.

EVIDENCE.—*Cross examination of a defendant who has made an affidavit.*—Section 38 of the 15 & 16 Vic. c. 86, was intended to apply to the case of a person only a witness, and not a party to the suit, as previously to this act, there was no authority to cross examine any person merely on the strength of his having made an affidavit. The result is that a person merely a witness who has made an affidavit, cannot be cross examined until after the evidence is closed, although, if he had been examined orally, he might have been orally cross examined at once, before the closing of the evidence. This result, however, is not perhaps quite what was intended. It appears to have occurred to the framers of the act, that this further opportunity of cross examining witnesses who had made affidavits was rendered necessary by the general practice of filing affidavits on the latest day, but that no such opportunity would be requisite in the case of witnesses examined *viva voce*. On the other hand, it is to be observed that there are no negative words in sec. 38; it is not said that the witness is not to be examined until after the closing of the evidence. The courts are not, therefore, not hampered by any prohibition. In sec. 40 another inconvenience was attempted to be met by the framers of the act, viz., that nobody could be compelled to be a witness upon any interlocutory application; and there seems to be no doubt but that that section was framed with a view to obviate that inconvenience. In the case of an injunction bill by the plaintiff, on motion in February, one of the defendants filed and used an affidavit. All the defendants put in answers (sufficiently long before the present motion) to interrogatories on the bill. By the direction of the court a cross bill had been filed, to which the plaintiff was not required to answer. The time for closing the evidence had not arrived when

the plaintiff moved that the defendant, who had made the affidavit used on the motion for an injunction, might be cross examined: Held, that he was liable to cross examination, although the evidence was not yet closed. *Clarke v. Law*, 2 Jur. N. S. 228.

INJUNCTION.—*Form of order for injunction.*—Where it is desired that the writ of injunction should not actually issue, the terms of the order should be that the defendant "be restrained," not that "an injunction be awarded to restrain" him. *Goldsmid v. Croft*, Week. Rep. 1855-6, p. 450.

MORTGAGE.—*Party to creditors suit—Mortgagee exercising power of sale—Costs.*—It is a general principle, that a mortgagee in a redemption suit is entitled to his costs of the suit. But this is not so where the defendant is a party to the suit, not merely in his character of mortgagee; in such a suit he can only have such costs in the suit as were properly incurred in that character. A mortgagee with a power of sale was made a party to a creditor's suit in respect of a mortgage, which was not impeached. He set up two other mortgages which were impeached and set aside. With the sanction of the court, he sold the mortgaged estate under his power of sale, and claimed to retain his costs of the suit:—Held, that he was only entitled to costs incurred as mortgagee, and not to his costs of the suit. *Wickenden v. Rayson*, Week. Rep. 1855-6, p. 443.

NEXT FRIEND.—*Person of substance* [1 Chron. 306]—*Plaintiff a married woman.*—The next friend of a married woman, a plaintiff in a suit, must be a person of substance, and able to give security for costs. *Hind v. Whitmore*, 27 Law Tim. Rep. 55; Week. Rep. 1855-6, p. 379.

PARTIES TO SUIT [vol. 1, pp. 60, 332].—15 & 16 Vic. c. 86, s. 44—*Appointment of a representative of an estate for the purposes of the suit.* B. C. was by H., who died in Calcutta, appointed his executor, and he there proved the will, but refused to take out administration to the testator in England. On motion, the court ordered that B. C. should be appointed to represent the estate of H., in order that the suit might be properly constituted. *Sutherland v. De Vienne*, 2 Jur. N. S. 301.

PARTIES TO SUIT.—*Personal representative—Creditor's suit* 15 & 16 Vic. c. 86,—*Demurrer.*—Where a creditor's right against his deceased debtor's general estate is only that of a general creditor, and where the debtor has died without having paid the debt, intestate, and no administration has been taken out, the Court of Chancery will not under the 15 & 16 Vic. c. 86, appoint a personal representative to distribute the estate. *Semble*, that in such a case a personal representative ought to be before the court and must be appointed in the usual

manner. A creditor's bill alleged *inter alia* that the defendant had acted as if he had been the personal representative of the deceased debtor, and prayed *inter alia* that the suit might (if necessary) be taken as one on behalf of all the creditors. A demurrer to such bill for want of parties was therefore allowed. *James v. Aster*, 27 Law Tim. Rep. 33; Week. Rep. 1855-6, p. 401.

PRODUCTION OF DOCUMENTS.—*Privileged—State Papers—Public policy—Sovereign power.*—The Court of Chancery refuses to compel the production of documents relating to matters of government or state affairs. This refusal is based upon two grounds, first, that such production would be prejudicial to the public interest, and is, therefore, against public policy; secondly, that such matters are, from their nature, exempted from municipal jurisdiction. A native Indian Prince, who had been deposed by an act of sovereign power of the East India Company, instituted a suit in the Court of Chancery in England against the company for the recovery of promissory notes which had belonged to him before his deposition and had been seized by the Indian Government: Held, that he was not entitled to the production, by the defendants, of any political communications which had passed between the company and their agents. *Veer Rajundur Wadeer v. The East India Company*, 27 Law Tim. Rep. 30.

PRODUCTION OF DOCUMENTS.—*Insufficiency of the schedules to an answer as to documents—Subsequent affidavit of particulars of documents.*—The plaintiff interrogated the defendants as to the possession of documents. The defendants by their answer admitted the possession of "divers" documents, and mentioned them generally in the schedules to their answer. The documents extended over several years, and related to different suits. The plaintiff was dissatisfied with the schedules, and took out a summons in chambers, for an order directing the defendants (*inter alia*) to file an affidavit stating and describing more particularly what documents they then or ever had in their possession relating to the matters in question in this suit: Held, that the defendants must make such affidavit accordingly. *Manby v. Bewicke*, 27 Law Tim. Rep. 55.

TRUSTEES.—*Payment into court by trustees—Appearance on petition—Costs.*—Upon petition for a transfer of stock out of court, where trustees had paid the fund into court, after notice by the petitioners that they did not approve of such payment, and should apply for the expenses of it against the trustees personally, and in their affidavit the trustees had sworn that to the best of their knowledge, the petitioners were the only persons entitled, the court allowed the trustees the costs of the payment

into court, but refused them the costs of their appearance on the petition. *Re Covington*. 26 Law Tim. Rep. p. 135.

COMMON LAW.

AGENT.—*Non-liability of indorser of bill of exchange acting as agent for the indorsee.*—In the case of *Kidson v. Dilworth* (5 Price, 564), an agent, Kidson, the plaintiff in equity, had received for his principal, Welsh, a defendant in equity, a bill payable to his (the agent's) order, and had indorsed it to his principal. An action was brought on behalf of the principal by the defendant, Dilworth, on this indorsement. The Court of Exchequer restrained it by injunction on the ground that the principal had no right to claim payment of the bill from his agent. Richards, C. B., said "shall he (the indorsee) be permitted to proceed, through the medium of another person, against a mere agent, because that agent has imprudently put his name on the instrument to satisfy a formality made necessary by the mode of drawing it? It is impossible." Graham, B.: "the plaintiff's letter was acquiesced in and acted on, and this bill was sent in consequence; it was a natural mode of remittance; it was also natural that the draft should have been made payable to the plaintiff, but still it was merely as an agent to Welsh, and it was indorsed by him in that character." Wood, B.: "the bill was clearly made payable to the plaintiff in his character of agent, and it was therefore necessary that he should indorse the bill *pro forma*; having done so, merely for the accommodation of the defendant, a court of equity ought not to suffer him to turn round on the agent and fix him with liability on such an indorsement. Had he indorsed the bill to guarantee the payment, it would have been a very different case; but here it is clear that nothing of the kind was meant, nor was there any consideration for his so doing: the nature of the transaction is very clear." In this case the proceeding was in equity; but the reasons given by the court show that, in their opinion, the facts of the case showed that it was not the intention of the parties that the indorser should be liable to the indorsee under his indorsement; and when that is the case, there is no implication of a promise to pay, and no legal liability out of which such promise would arise. In such cases the written indorsement may be indeed unqualified in its terms; but the delivery to the indorsee, from which, together with the written indorsement, and not from the written indorsement alone, the contract between the parties is to be inferred, is so circumstanced as to show that the indorser does not make himself liable to his indorsee: this is a defence at law, though a court of equity may have a concurrent jurisdiction. The above case has been followed by

the Privy Council, which decided in the case of the indorsement of a bill of exchange made without any reservation as to the liability of the indorser and where it appeared from the course of dealing between the parties that the indorser was acting as agent for the indorsee, and that he bought the bill and remitted it to the indorsee on account of monies received on his behalf, that in the absence of any circumstances showing that it was intended to fix the liability on the indorser, the indorser was not liable to the indorsee for the amount of the bill when dishonoured. *Castrique v. Buttigieg*, Week. Rep. 1855-6, p. 445.

BILL OF EXCHANGE.—*Indorsement to a party to give bill currency—Suing acceptor.*—Where a party put his name on a bill at the instance of the drawer, for the purpose of giving it currency, and afterwards took it up: Held, that, notwithstanding that he never had possession of the bill until it had arrived at maturity, he was not precluded from suing the acceptor. *Fulton v. Waterson*, 27 Law Tim. Rep. 46.

COPYRIGHT [1 Chron. 231, 272; ante, p. 232, 233].—*Dramatic Copyright Act, 3 & 4 Will. 4, c. 15, ss. 1, 2—Author and employer—Vesting of copyright—Right of representation in employer.*—A person who employs another to adapt a foreign dramatic piece for representation upon the English stage, and who has no other share in the design or execution of the work than that of suggesting the subject, is not "the author" of such adaptation within the meaning of statute 3 & 4 Will. 4, c. 15; and therefore, when such employment is by parol, the employer has not the right of representing it without an assignment in writing from the author. *Quære*, whether under any circumstances the copyright in a literary work, or the right of representation in a dramatic one, can become vested *ab initio* in the employer of another person who has actually composed or adapted the work? *Shepherd v. Conquest*, 2 Jur. N. S. 236; Week. Rep. 1855-6, p. 283.

EJECTMENT—15 & 16 Vic. c. 76, s. 210—*Forfeiture—Covenant against assignment—Insufficient distress on the premises—Burthen of proof—Evidence.*—In an action of ejectment for breach of covenant, brought by a landlord against his tenant, since the 15 & 16 Vic. c. 76, s. 210, it appeared that the plaintiff had sought to re-enter on the premises for a forfeiture for breach of a covenant not to assign without consent, but found them shut up and empty:—Held, that in order to entitle the plaintiff to recover, it was not necessary for him to shew that there was no sufficient distress found on the premises at the time when he attempted to re-enter. *Quære*, whether in such a case, after

proof of the covenant not to assign, and an assignment by the tenant, the plaintiff is bound to give any evidence that the assignment was made without consent? But, held, that the evidence of the manager of the plaintiff's property that he was not aware of any license to assign having been granted, is sufficient to turn the burthen of proof of a license on the defendant. *Wedgwood v Hart*, 2 Jur. N. S. 288.

ELECTIONS.—*Parliament list of voters*—*Overseer's signature*—6 Vic. c. 18, ss. 13, 101.—The 13th section of the 6 Vic. c. 18, which enacts, that the overseers of every parish in a borough shall make out certain lists of voters, and shall sign such lists, is as to the signing, directory only; and, therefore, a list made out by the overseers is valid, though unsigned. *Morgan v. Parry*, 2 Jur. N. S. p. 285; Week. Rep. 1855-6, p. 286.

HUSBAND AND WIFE.—*Liability of husband*—*Divorce a mensa et thoro*—*Action for costs*—*Reasonable ground for instituting the suit*.—It was determined in *Grindell v. Godmond* (5 Ad. and El. 755), that if the wife indicts her husband for an assault upon her, he is not liable for the costs of the indictment; and that is correct, because an indictment is for the punishment of the husband, and is not necessary for the protection of the wife. But a divorce *a mensa et thoro*, when there has been cruelty, is necessary for the protection of the wife. As she has no property of her own, unless she can pledge the credit of her husband she never can have that protection. In the same manner, if the husband threatens to commit violence on his wife, she may exhibit articles of the peace against him, and he is liable for the expenses of that proceeding. Lord Ellenborough, in *Shepherd v. Mackoul* (3 Camp. 326, 327), lays down the proper principle. "She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, charge her husband for the necessary expense of this proceeding, as much as for necessaries, food, and raiment." In an action by a proctor against the husband for costs incurred in a suit for a divorce *a mensa et thoro* on the ground of cruelty, instituted by the wife against the husband, the wife having died pending the suit: Held, that such a suit was within the rule which enables a wife to pledge the credit of her husband for necessaries, and that in order to maintain the action the plaintiff need not prove that the wife was entitled to a divorce, but must show reasonable evidence for instituting the suit. *Brown v. Ackroyd*, 2 Jur. N. S. 283; Week. Rep. 1855-6, p. 229.

ELECTION LAW.—*Appeal from revising barrister's court*—*List of voters in respect of occupation*—*How to be signed*.—The 6 Vic. c. 18, s. 13, enacts,

that the overseers of every parish or township shall make out a list of persons entitled to vote in respect of occupation of premises of the value of not less than £10, and that the said overseers shall sign such lists. Sec. 101 enacts, that the word "overseer" shall extend to, and mean all persons who, by virtue of any office or appointment, shall execute the duty of overseers, and that all matters by that act directed to be done by the overseers, might lawfully be done by the major part of such overseers. The town and liberty of Aberystwith is a chapelry within the parish of Llanbadarnfawr, maintaining its own poor, and having two overseers, two churchwardens, and an assistant overseer, executing the usual duties of their respective offices. The list of voters, in respect of occupation was signed by the two overseers only; and the revising barrister held, that it was invalid, on the ground that 6 Vic. c. 18, s. 13, is imperative, and not merely directory:—Held, that the signature of the overseers not being essential to the list, but merely added to it, to identify it as the one made out by the overseers, and that being capable of proof aliunde, the words of the 13th section are to be construed as directory, and that the list ought not to have been treated by the revising barrister as invalid. *Quære*, whether churchwardens of a chapelry are overseers of the poor within 6 Vic. c. 18. *Morgan (appellant) v. Parry (respondent)* 26 Law Tim. Rep. 292.

EVIDENCE.—*Parol evidence*—*Agreement in writing without a date*—*Evidence of what took place at time of signing*.—Parol evidence is admissible to show that at the time of signing an agreement which bore no date, and which stipulated that rent should commence "this day," it was verbally agreed that rent should not commence until repairs to be done to the premises were completed. *Davies v. Jones*, Week. Rep. 1855-6, p. 248.

HORSE RACING.—*Owner of winning horse suing for stakes*—*Decision of stewards*—*Difference of opinion*.—By one of the conditions of a race, in case of dispute the decision of the stewards was to be final. The stewards could not agree among themselves as to which horse was the winner, but some of them made an award which was invalid. The owner of the horse in whose favour the invalid award was made brought an action against the treasurer to recover the stakes, and proposed to show that his horse was the winner: Held, that such evidence could not be received, and that the plaintiff was properly non-suited. *Brown v. Overbury*, Week. Rep. 1855-6, p. 252.

INSURANCE AGAINST FIRE.—*Interest*—*Warehouseman*.—An insurance by a warehouseman against loss or damage by fire, to goods held by him

in trust, covers the value of goods which he holds as a bailee for the owners; and such an insurance is a valid one, the proceeds being, when recovered by the warehouseman, held by him as a trustee for the owners of the goods. *Waters v. The Monarch Fire and Life Insurance Company*, Week. Rep. 1855-6, p. 245.

NUISANCE.—*Action by owner of the reversion—Nuisance permanent or temporary—Question for the judge.*—In *Baxter v. Taylor* (4 B. and Adol. 72), it was decided that a reversioner cannot maintain an action against a stranger, for merely entering upon his land, held, by a tenant on lease, though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversion. In accordance with the above decision, it has been held, that in an action by a reversioner for damage to his property in erecting a nuisance, it is requisite to prove that the nuisance is of a permanent nature, and so to be continued as to injure the reversionary interest. Where a mortgagor, who had left the property to a tenant subsequent to the mortgage, brought an action against a railway company for erecting a shed, in which they repaired their engines, so near to the mortgagor's premises as to be a nuisance, and diminish the value of his premises: Held, that the supposed nuisance from the alleged noise and hammering in repairing the engines was not of such a permanent nature as to enable the plaintiff to support this action as an injury to his reversion. *Quære*, whether the plaintiff as mortgagor, the premises being let by him to a tenant, had such a reversion to entitle him to bring the action. *Mumford v. The Oxford, &c., Railway Company*, 27 Law Tim. Rep. 58.

PUBLIC COMPANY.—*Railway—Carriers—Packed parcels—Inclosures.*—In an action against a railway company for making improper and unequal charges, damages for general loss of business sustained by the plaintiff in consequence cannot be recovered. *Quære*, whether special damages could be recovered on a declaration alleging that defendants designedly refused to carry parcels which they were bound by law to take, for the purpose of getting a monopoly in their hands and destroying the trade of plaintiff. A railway company has no right to make an extra charge for the carriage of packed parcels. The law relating to packed parcels reviewed, per Martin, B. *Crouch v. The Great Northern Railway Company*, 26 Law Tim. Rep. p. 298.

SHIPPING.—*Wages—Freight mother of wages, how affected by statute law—Did not apply to master of a ship.*—The maxim that "Freight is the mother of wages," was confined to common seamen, and

now by the Merchant Shipping Act, 1854 (17 & 18 Vic. c. 104, s. 183, and by the 7 & 8 Vic. c. 112, s. 17), in all cases of wreck or loss of the ship every surviving seaman is to be entitled to his wages up to the period of the wreck or loss of the ship, whether such ship shall or shall not have previously earned freight, on producing a certificate from the chief surviving officer, that he exerted himself to the utmost to save the ship, cargo, and stores. It has recently been decided by the Court of Queen's Bench that the rule which deprived the seamen of wages, if no freight was earned, does not apply to the master of a ship; and that therefore, where a ship was lost, the administratrix of the captain was entitled to maintain an action for wages, for the period of his service before the loss. *Hawkins v. Twysall*, 2 Jur. N. S. 302.

SALE OF GOODS.—*Fraud—Right to rescind contract—Property—Trover.*—When a vendee obtains possession of a chattel with an intention by the vendor to transfer both the property and the possession although the vendee has made a false and fraudulent representation in order to effect a contract or obtain the property, the property in the goods vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred over the whole or part of the chattels to an innocent transferee, the title of such transferee is good against the vendor. *Kingsford v. Merry*, Week. Rep. 1855-6, p. 253.

COMMON LAW PRACTICE.

AMENDMENT AT TRIAL [1 Chron. pp. 16, 127, 163, 310, 418].—*Writ of trial*—3 & 4 Will. 4, c. 42; 15 & 16 Vic. c. 76, s. 222 [stated, 1 Chron. p. 16].—The 15 & 16 Vic. c. 76, s. 222, which gives large powers of amendment to the judges of the superior courts and judges sittings at nisi prius, does not extend to the case of a sheriff or other persons presiding at the trial of a cause under a writ of trial issued under 3 & 4 Will. 4, c. 42. To an action for goods sold and delivered, and goods bargained and sold, the defendant pleaded *nunquam indebitatus*. The plaintiff's evidence failing to prove either count, the secondary, before whom the case was tried, allowed him to amend by adding a count for not accepting the goods: Held, that the secondary had no power to make this amendment under stat. 3 & 4 Will. 4, c. 42. *Semble*, that by force of the statute 15 & 16 Vic. c. 76, s. 222 [stated 1 Chron. p. 16], such an amendment might be made by a judge sitting at nisi prius. *Wickes v. Grove*, 2 Jur. N. S. p. 212.

AMENDMENT AT TRIAL [vol. 1, pp. 16, 127, 163, 310, 418].—*Secondary of London—Power of*

amendment—Common Law Procedure Act, 1854 s. 19; 3 & 4 Wm. 4, c. 42, s. 23.—The 96th section of the Common Law Procedure Act, 1854, empowering the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, to amend the proceedings, does not apply to trials in inferior courts of record; and the power of amendment in those courts is still limited to the matters specified in the 3 & 4 Wm. 4, c. 42, s. 23. *Wicks v. Groves*, Week. Rep. 1855-6, p. 253.

AWARD.—*Time to set aside—Delay on account of sickness.*—The sickness of a person who desires to set aside an award is not a sufficient excuse for postponing the application to the court, beyond the term next after the publication. He should move to have the time enlarged. *Guardin v. Brown*, 27 Law Tim. Rep. 55.

ATTACHMENT OF DEBTS [1 Chron. pp. 116, 160, 271, 419].—*Superannuation allowance—53 Geo. 3, c. 155, s. 93—Attachable debt under the Common Law Procedure Act, 1854.*—The superannuation allowance to a retired clerk of the East India Company, granted by a resolution of the court of directors by virtue of statute 53 Geo. 3, c. 155, s. 93, is not attachable, under the Common Law Procedure Act, 1854, to answer a judgment debt due from such clerk. *Innes v. The East India Company*, 2 Jur. N. S. p. 189.

ATTACHMENT OF DEBT [vol. 1, pp. 116, 160, 271, 419].—*Common Law Procedure Act, 1854, s. 61—Attachable debt—East India Company's Act 53 Geo. 3, c. 155, s. 93—Allowance in the nature of superannuation.*—An allowance in the nature of superannuation (under s. 93 of Geo. 3, c. 155) to an officer of the East India Company, from age or infirmity no longer qualified for the execution of his office or employment, is not a debt from the company to such officer attachable under s. 61 of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125). *Innes v. the East India Company*, Week. Rep. 1855-6, p. 245.

COSTS.—*Taxation of several defendants—Abatement—Pleading singly—Statute of Gloucester—Statute 4 Anne, c. 16—Double pleadings—Common Law Procedure Act, 1852, ss. 36, 39, 81; r. 62 H. T. 1858.*—The 81st section of the Common Law Procedure Act, 1852, contains provisions for double pleading in certain cases, and concludes by a proviso, by which it is provided, "that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of any other issue or issues." In an action against M. to recover a sum exceeding £600, he pleaded in abatement the nonjoinder of B. and C., and thereupon under 15 & 16 Vic. c. 76, s. 36, B. and G.

were added as defendants. M., B., and G. then pleaded separately, M. and B. by the same attorney. M. pleaded as to £230 payment into court, and as to the residue "never indebted." B. and G. pleaded "never indebted" as to the whole. Issues being joined, a verdict was found for M. on his plea, that no more than £230 was due, and against B. and G. that they were jointly liable with M. for £212 7s. 9d.: Held (on cause being shown against a rule to review the master's taxation), that M. is entitled to the costs of his plea in abatement and amendment under 15 & 16 Vic. c. 76, s. 39, and to the general costs of the causes and the trial, as succeeding on an issue which entitles him to the judgment he has obtained. With respect to the costs to be allowed to the plaintiffs, against the unsuccessful defendants, that as plaintiffs were entitled to no judgment for damages, they could have no costs under the statute of Gloucester. That there was here no double pleading, either under the 4 Anne, c. 16, or the late Procedure Acts, and, therefore, the plaintiffs were not entitled to costs under 4 Anne. That by the proviso in the 81st sec. of 15 & 16 Vic. c. 76, it seems to have been intended to remove the doubts in *Partridge v. Gardner* (6 Exch. Rep. 21), and that it does not extend to cases where there is only one plea, and where plaintiff, succeeding on a single issue, cannot have judgment, or where the pleadings in one action against two or more defendants are at common law, and, each pleading separately, one defendant succeeds on his single plea so as to prevent the plaintiff having judgment against the co-defendant or co-defendants who have failed on the issues on the other pleas, but to cases of double pleading only. That r. 62 H. T. 1852, does not apply to this case, as neither issues of law or fact are raised within the first part of the rule, nor are plaintiffs or B. or G. entitled to the general costs of the cause, within the latter part. That as there seems to be no rule, or statute to entitle the plaintiffs to costs, the rule for disallowing them must be made absolute, but without costs. *Cazneaw v. Morrice, Brewer, and Grandine*, Week. Rep. 1855-6, p. 247.

COSTS.—*County Court Acts—Set off, reducing amount.*—Since the passing of 13 & 14 Vic. c. 61, if an action be brought for a sum between £20 and £50, and the claim be reduced at the trial by reason of a set off, the plaintiff is not entitled to his costs, unless there be a certificate, rule, or order for them under that statute. *Ashcroft v. Foulkes*, Week. Rep. 1855-6, p. 457.

INTERROGATORIES FOR DISCOVERY [1 Chron. pp. 160, 206, 312, 345, 381, 436] *Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125), ss. 51, 52—Interrogatories—Discovery—Matter of law*

—*Discretion—Attorney plaintiff—Affidavit—Waiver.*

—Under sec. 51 of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125), interrogatories may be delivered to such matters as might be interrogated to by a bill of discovery in a court of equity (see 1 Chron. p. 160); and, therefore, whatever is common to both plaintiff's and defendant's case may be inquired into by either party, though the answers may disclose the case of his opponent; but neither party can interrogate the other as to matters which relate exclusively to his opponent's case. By Lord Campbell, C. J. In a case falling within the statute, the court is bound to grant the application. In actions against a land surveyor for negligence in the valuation and survey of certain estates, and against an attorney for negligence in not defending certain actions brought against plaintiff:—Held, first, that plaintiff might deliver interrogatories asking what steps defendant had taken in the business in question. Secondly, that interrogatories asking defendant what steps it was his duty to take under his instructions were not admissible, being matter of law. In an action by an attorney, the application was made upon an affidavit of the plaintiff describing him as attorney. The application had been heard before a judge at chambers, when the summons was indorsed, by consent, "disallowed, without prejudice to any future application:"—Held, that an objection, under sec. 52, that the attorney of the plaintiff ought to have joined in the affidavit, not not having been taken at chambers was waived. *Whateley v. Crawford*, 2 Jur. N. S. p. 207.

INTERROGATORIES [vol. 1 pp. 160, 312, 345, 381, 436].—*Common Law Procedure Act, 1854, (17 & 18 Vic. c. 125, s. 51)—Ejectment—Forfeiture—Interrogatories—Privilege of witness in not answering.*—The 51st section of the Common Law Procedure Act, 1854, which enables either party in a cause to deliver written interrogatories to the other, extends to actions of ejectment (affirming *Fritchcroft v. Fletcher*, 2 Jur. N. S. 191). The court will not, on a motion for leave to deliver interrogatories, entertain the objection that they are such as the party to be interrogated is privileged from answering. Such objection must be taken when the interrogatories are administered (affirming *Osborn v. the London Dock Company*, 10 Exch. 698; S. C., 1 Jur. N. S., 93). In an action of ejectment on a forfeiture for breaches of the conditions in a lease, the court granted leave generally to deliver interrogatories to the defendant as to the existence of the lease and the extent of the demised premises, subject to any objection, if valid, which might be taken by the defendant to answering any of the interrogatories when administered, on the ground of their tending to disclose a forfeiture of his estate. *Quere,*

whether, if the interrogatories have that tendency, the objection would be valid. *Chester v. Wortley* Week. Rep. 1855-6, p. 325; 2 Jur. N. S. 287.

PROCESS.—*Original writ—Concurrent writ*—*C. L. P. A. 1852.*—A concurrent writ can only be issued once on the original writ, and it must be within six months from the time of such issuing. Therefore, when a plaintiff had issued his original writ in April 1851, and continued it from time to time, and after the passing of the C. L. P. A. 1852, again renewed it and issued a concurrent writ more than six months after the renewal which was served abroad, such concurrent writ was held void, and was set aside accordingly. *Cole v. Sherrard*, 26 Law Tim. Rep. p. 138.

RULE.—*Improperly drawn up—Producing necessary document—Common Law Procedure Act 1854, s. 46.*—If a rule be so drawn up that sufficient materials are not brought before the court, the court may, in their discretion, under s. 46 of the Common Law Procedure Act, 1854, make an order for the production of a document they may deem necessary for the discussion of the rule. *Ashcroft v. Foulkers*, Week. Rep. 1855-6, p. 457.

WRIT OF SUMMONS.—*Indorsement—Attorney plaintiff—Residence—Common Law Procedure Act, 15 & 16 Vic. c. 76, s. 6.*—By section 6 of the Common Law Procedure Act, 1852, every writ of summons is to be indorsed with the name and place of abode of the attorney suing out the same; and if no attorney be employed, then with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be. In the indorsement on a writ of summons issued by an attorney plaintiff in person his place of business is properly described as his "residence," within the above 6th section of the Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76). *Ablett v. Barham*, 2 Jur. N. S. 285.

BANKRUPTCY AND INSOLVENCY.

ANNULING VESTING ORDER.—*On creditor's petition, where debt impeachable.*—Where the debt upon which a vesting order upon a creditor's petition is obtained can be impeached as non-existing, upon the ground of natural equity as between the debtor and the creditor obtaining the order: Held, that it may be annulled by the court without the consent of the petitioning creditor. *Re Witherden*, 27 Law Tim. Rep. 35.

ASSIGNEE.—*Attorney—allowance for professional charges.*—An attorney being assignee of the estate and effects of an insolvent debtor charges for business done professionally, whereby the estate

has been greatly benefited :—Held, that an assignee is only a trustee *sub modo* for the purpose of the act. and, therefore, that he is entitled to remuneration for professional business done by him on behalf of the estate in his capacity of attorney, such business being performed *bond fide* for the benefit of the estate. *Re Edmund Meadowcroft*, 27 Law Tim. Rep. 43.

BILLS OF SALE—*Registry of* [1 Chron. pp. 29, 64, 136, 195, 271, 280, 407].—*Bills of Sales Act*, 17 & 18 Vic. c. 36 (*English analogous*, 17 & 18 Vic. c. 36)—*Names, residence, and occupation of grantor—Grantee and attesting witness—Esquire not a proper description—Order and disposition clauses.*—In registering a bill of sale it is necessary that not only the names, residences, and occupations of the grantor and grantee should be given, but also the residence and occupation of the attesting witness. Esquire is not a proper description for a merchant. If there be any omission in those respects, a creditor getting a bill of sale will have no priority in case of bankruptcy. The Bill of Sales Act does not repeal the order and disposition clauses in bankruptcy. *Re Arthur O'Connor*, 27 Law Tim. Rep. 27.

FRAUDULENT PREFERENCE.—*Warrant of attorney given within three months of petition—1 & 2 Vic. c. 110, s. 59—Meaning of "void" in sec. 59—Title of assignee by relation—Demand and refusal—Evidence.*—The stat. 1 & 2 Vic. c. 110 s. 59, enacts that "if any such prisoner shall, before or after his or her imprisonment, being in insolvent circumstances, voluntary convey, assign, transfer, charge, deliver or make over any estate, real or personal security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit or advantage of any creditor or creditors, every such conveyance, &c. shall be deemed, and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act; provided always that no such conveyance, &c. shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so transferring, charging, assigning, conveying, delivering or making over of petitioning the said court for his discharge from custody under this act." In an action by the assignee of F., an insolvent, the declaration stated that the defendant, before F. became insolvent, converted to his use or wrongfully deprived F. of the use and possession of his goods. The defendant pleaded not guilty; and, that before the insolvency the defendant had recovered a judgment against F., wherein a *f. fa.* had been sued out, and that the seizure, sale and levy, were the con-

version complained of. To this the plaintiff replied, that after 1 & 2 Vic. c. 110, and within three months of the insolvent's imprisonment, F., with the view of petitioning the court, fraudulently charged his estate, by giving to the defendant, a creditor, a warrant of attorney fraudulent and void within the statute whereon the defendant obtained the judgment mentioned in the plea: issue thereon. It was proved that the warrant of attorney was given voluntarily within three months of the imprisonment of the insolvent, and there was clear evidence that it was with the view of giving the defendant a fraudulent preference, and the adjudication on the petition was also admitted, after being objected to by defendants counsel, and read to the jury. It contained an adjudication that on the ground that the insolvent had, in order to give a preference, fraudulently charged his estate, he should be imprisoned for one year. It was then proved that, having been taken into custody on the day of the adjudication, he was discharged within three days by the defendant. The only evidence of the conversion alleged of F.'s goods was, that the defendant, the only detaining creditor, directed the sale of the goods under the execution: Held, that the adjudication, although no evidence of the fact of the fraudulent charge therein stated, was admissible to show the time for which the insolvent was imprisoned, and the connection with the discharge of the insolvent by the defendant, and to show the footing upon which defendant and the insolvent were with each other: Held, also, by the majority of the court (Williams and Crowder, J. J., dissentientibus), that there was evidence to go to the jury on the issues raised; that the plaintiff was entitled to recover, and in this form of action; that "void" as against assignees, in 1 & 2 Vic. c. 110, s. 59, meant absolutely void as against assignees from the time when the act prohibited was done; that a demand and refusal in order to prove a conversion were unnecessary, since the act of the defendant in procuring the sale was itself a conversion by reason of which the plaintiff, when he subsequently became appointed assignee was damaged: Held, per Williams and Crowder, J. J. (b) that "void" in sec. 59 meant voidable merely at the election of the assignees; that if it meant absolutely void against the assignee from the act done, there was no evidence of a tortious act on the part of defendant so as to amount to a conversion within the meaning of the first count of the declaration; and that a demand and refusal were necessary to make out the conversion. *Young v. Billeter or Billeter v. Young*, 26 Law Tim. Rep. p. 327; Week. Rep. 1855-6, p. 369.

PETITIONING DEBTOR.—*Sufficient assets—12 & 13 Vic. c. 106, s. 93, and 17 & 18 Vic. c. 119*—[vol. 1, pp. 153, 264].—It is for the Court of

Bankruptcy, and that court alone, to determine whether or not the available estate of a trader petitioning for adjudication of bankruptcy against himself is sufficient to produce the sum of £150. *Pennell v. Butley*, Week. Rep. 1855-6, p. 456.

PROOF OF DEBT.—*Sum payable in futuro*—*Post-obit bond*—*Heir-apparent of a tenant in tail in remainder*—*Existing debt*—1 & 2 Vic. c. 110, ss. 75 & 80.—By ss. 75 & 80 of the 1 & 2 Vic. c. 110 (relating to insolvent debtors), it is enacted that the discharge under that act shall extend to the several debts and sums of money due or claimed to be due at the time of making the vesting order (of a petitioner for discharge under the Insolvent Acts) to the several persons named in his schedule as creditors or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid. By the 80th section it is enacted that the discharge shall extend to any sum and sums of money which shall be payable by way of annuity or otherwise at any future time or times by virtue of any bond, covenant, or other securities of any nature whatsoever; and that every person who would be a creditor of such prisoner for such sum or sums of money, if the same were presently due, shall be admissible as a creditor of such prisoner for the value of such sum or sums of money so payable as aforesaid, which value the said court shall upon application at any time made in that behalf, ascertain, regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of making such vesting order as aforesaid; and such creditor shall be entitled in respect of such value to the benefit of all the provisions made for creditors by that act, without prejudice nevertheless to the respective securities of such creditor, excepting as respects such prisoners discharged under that Act. In a suit in equity, it appeared that the plaintiff in 1835, being heir apparent of his father who was tenant in tail in remainder of certain property, expectant upon a life-estate, executed a post-obit bond for £100., which was conditioned to be void on payment within three months after the death of the survivor of the father and the tenant for life. In 1842, while the father and the tenant for life were still living, the plaintiff became insolvent, and in the same year he obtained his final discharge. The obligee of the bond did not prove

under the insolvency. Afterwards, upon the death of the tenant for life, who survived the father, plaintiff became entitled as tenant in tail in possession, and being so, in 1853, he executed an assignment of the property in question to the defendant, in trust for the benefit in the first place of creditors. The suit was brought by the plaintiff against the defendants, for carrying into execution the trusts of the deed, and the obligee of the bond had been certified by the chief clerk to be a creditor in the suit: Held, on motion to vary the chief clerk's certificate, on the ground that the obligee ought to have gone in and had his debt valued and paid under the insolvency, that the claim was not an existing debt in the year 1842, therefore that the Insolvency Debtors' Relief Act did not apply to the claim of the obligee; and motion dismissed with costs *Harker v. Hallewell* 27 Law Tim. Rep. 40.

PROOF OF DEBT.—*Unascertained demand*—[ante, p. 109—116]—*Contract to insure*—*Verdict after bankruptcy* [1 Chron. p. 19]—*Assignees not interfering*.—Where a bankrupt has entered into a contract respecting goods, and there is nothing open to dispute, except the mere question of value, and it is proved that there is a market price governing the value of the goods, the contractee may prove for such value. A timber merchant left timber in the hands of the bankrupts, who were owners of saw mills, under a verbal agreement that in case of fire the bankrupts should make good the value of the timber burnt. The timber was burnt, and an action commenced by the merchant before the bankruptcy for the loss. A verdict was obtained against the bankrupts after the bankruptcy, the assignees not having intervened in the action. The merchant was held entitled to prove in the bankruptcy for the value of the timber burnt. Per Turner, L. J., if the contract had been to insure the timber, and the bankrupt had failed to do so, and the timber had been burnt, the merchant might have proved in the bankruptcy for the value. *Re Routledge*, 26 Law Tim. Rep. p. 817.

PROOF OF DEBT.—*Co-contractors*—*Joint creditors*—*Collateral security*—*Merger of debt* [1 Chron. 287, 8]—*Costs*—*Judgment as collateral security*.—Where two, who are the principal or original debtors, execute a joint bond, with a third party as their surety, and the creditor enters up a joint judgment on a bond, he cannot, upon the original debtors becoming bankrupt, prove upon their estate upon foot of the joint judgment, whilst their co-contractor remains solvent. This rule is not confined to cases of partnership, but applies to contracts generally. Where creditors have a judgment on a bond given as a collateral security for advances to be made, the

doctrine of merger does not apply, and the creditor may prove on foot of the simple contract. Parties signing a guarantee will not be regarded as original debtors to the creditors to whom the guarantee is given, but it will be treated as a collateral security. Where a creditor's proof is not properly prepared, and another meeting is necessary, he must pay a portion of the costs incurred. A creditor volunteering to aid the assignee in objecting to a proof will not be allowed any costs. *Re Agnew*, 27 Law Tim. Rep. 27.

PROTECTION.—*Contracting debts by gross and culpable negligence.*—When the major portion of the debts of a petitioner are contracted by gross and culpable negligence, and there is little or no estate for creditors:—Held, that he has no *locus standi* under the protection acts. *Re Voules*, 27 Law Tim. Rep. 20.

REMAND.—*Damages in an action for seduction.*—The court, in forming its judgment of the length of time for which an insolvent shall continue in custody at the suit of a complaining creditor for damages recovered in an action of seduction, will be regulated by the amount of damages recovered, having regard also to the station in life of the parties: *Semble*, that the costs in the action do not effect the question of discharge. *Re Richard Sennett*, 26 Law Tim. Rep. p. 332.

TRADER DEBTOR.—*Owing above £300—Insolvent liable to pay an annuity for life—To be estimated and inserted in schedule:*—Held, that where an insolvent is liable to the payment of an annuity for life, not merely the arrears due upon the annuity, but the whole value of the annuity, must be inserted in the schedule; and if that value, together with the other debts, amount to above £300, the petition must be dismissed. *Re John Styles*, 26 Law Tim. Rep. p. 332.

CRIMINAL LAW

CERTIORARI.—*Conviction by magistrates—9 Geo. 4, c. 31, ss. 17, 29—Assault—Title to land.*—The court will not grant a certiorari to bring up and quash a conviction by magistrates under 9 Geo. 4, c. 31, s. 27, on an affidavit by the defendant which states that the assault for which he was convicted arose out of a dispute as to the title to land, if it appears that on the hearing of the complaint there was any evidence before the magistrates on which they might decide that the assault was committed independent of, or before any dispute arose as to the title to land. *Regina v. Edwards*, Week. Rep. 1855-6, p. 267.

METROPOLITAN BUILDINGS ACT.—*District surveyor—Extortion—Certiorari—Statute 7 & 8 Vic. c. 84.*—The 79th section of the 7 & 8 Vic. c. 84, enacts that "if any surveyor demand or wil-

fully receive any higher fee than he shall be entitled to under this act, or if in his capacity of surveyor he receive a fee for any act or omission in respect of which he is not entitled to receive any remuneration, or if he refuse to refund any fee wrongfully received by him in respect whereof the official referees shall have made an order to that effect, or behave himself negligently or unfaithfully in the discharge thereof," certain penal consequences, including discharge from, and perpetual incapacity to hold office, are to follow:—Held, that the offence secondly enumerated could not be committed except with a corrupt and evil intention, and by a receiving a fee for an act or omission in respect of which no fee would under the statute be due, although the particular act should be done or omitted. By the 104th section of the statute, the writ of certiorari is taken away. From affidavits used in support of motions to bring up and afterwards to quash the order, it appeared that until after the twenty-one days there was a slate cistern on the top of one of the privies, with an opening twelve inches wide, and that the partition between the two other privies was only four inches thick, instead of eight inches thick, as the act required. After the twenty-one days, the privy was covered in, and the partition increased to eight inches; and the defendant then demanded, under an innocent mistake as to his right, a further fee of 10s. in respect of each of these privies, making in the whole 30s.: Held, per Coleridge, Erle, and Wightman, J. J. (dissentiente, Lord Campbell, C.J.) that either the order and complaint disclosed an offence to which the criminal remedy given by the 79th section was not intended to apply, the act done or omitted being one for which a fee was payable under the act; or that the order and complaint were so informal and ambiguous as to justify the court in looking at the affidavits, which showed not a charge of an unintentional crime, but a complaint of a demand made under an innocent mistake, and that in either case the certiorari had properly issued, and the order ought to be quashed. *Reg. v. Badger*, 26 Law Tim. Rep. p. 324.

ANSWERS TO MOOT POINTS.

No. 59.—*Effect of the insertion or non-insertion of a consideration in a modern assurance.*

Upon a careful reconsideration of this point, I must admit, that my antagonists have the best of the argument, and that in a deed of grant (as contradistinguished from a bargain and sale and covenant to stand seized and perhaps a deed of appointment), the effect of the insertion of a consideration is simply negative. A. L. TROTMAN.

No. 65.—*Executor renouncing Devolution of Executorship* (*ante*, p. 311).

With reference to the question raised under this head, I am of opinion that the objection taken by the purchaser's solicitor is valid. "It is common for one or more of the executors to renounce the probate, and then the other executors prove, and die in the lifetime of the disclaiming executors. In this instance the disclaiming executors must either prove the will, as they may do, or they must renounce the probate, and if they renounce the probate, administration *de bonis non* must be granted," 1 Prest. Abst. p. 186.

This seems to support the view of the purchaser's solicitor, namely that C. must either prove the will of A., and be a party to the conveyance for the purpose of discharging the mortgage, or he must renounce the probate; in the latter case, I think the representation would cease altogether. The proper party to join in the conveyance would be A.'s next of kin who would have to take out administration *de bonis non*.

J. G. B. EDWIN.

No. 65.—*Executor renouncing—Devolution of Executorship* (*ante*, p. 311).

The renunciation of one executor is never absolute and irrevocable, and upon the death of the proving executor, he may still come in and prove. Therefore upon the death of one of several executors, the continuance of the representation will not be by the executors of such executor, but by the survivors, or if they refuse, by an administrator of the original testator.

Comyn in his Digest ("Administration" G.) says: "If there be more than one executor, the office on the death of one, devolves on the survivor, although the deceased executor may have been the sole acting executor, and the surviving executor may have refused the office in the deceased executor's lifetime, and actually renounced." This is so exactly in point with the case mooted, that there cannot be the slightest doubt that C. the renouncing and surviving executor, was the proper person to give a receipt for the mortgage money, and if he refused, then the administrator of the original testator A.

FRED. SMITH.

No. 66.—*Devise—Construction* (*ante*, p. 311).

I think the subsequent qualification in this will, occurring after the devise to B., namely, "subject nevertheless that all the stock, produce, income, and profits arising from *all and every part of the aforesaid premises*," clearly shews the intention of the testator to be, that the widow should take a life estate in the *whole* property.

J. G. B. EDWIN.

No. 66.—*Devise—Construction* (*ante* p. 311).

I take it to be quite clear that under the words of this devise the widow would be entitled to a life interest in testator's real property.

W. H. RANGLES

No. 67.—*Devise—Dying before Receiving Share* (*ante*, p. 311):

It seems quite clear that the husband is entitled to the share in question. The words, "but if any child should die before they should have received their share leaving issue, the issue to take equally the parents share so dying," are not to be construed literally. The construction the court would put upon them, I think would be, that the children who should acquire a vested interest in their shares by attaining twenty-one years of age, the same should not lapse, if they should die in the lifetime of the testator, or the tenant for life, but that such share should go to the issue of such children so dying. But this state of things has not happened, inasmuch, as the child survived both the testator and the tenant for life. On the death of the tenant for life, the daughter became entitled in possession, and the property not having been bequeathed to her separate use, clearly became the property of her husband, who, I think, is undoubtedly entitled to it.

J. G. B. EDWIN.

No. 67.—*Devise—Dying before receiving share* (*ante*, p. 311).

As testator's daughter survived the age of twenty-one years, at which time and not before the legacy vests, the attainment to that age being a condition precedent to the gift, I think that on her death, before receiving the money, the same would go to the husband and he would be entitled to administration thereof to the exclusion of the child who could not claim any provision thereout, for the legacy being vested the wife was possessed of it at her death, and might have received it immediately on arriving at the age of twenty-one.

W. H. RANGLES.

No. 68.—*Trustees of Dissenting Chapels* (*ante*, p. 311).

I cannot find that there are any acts of Parliament regulating the proceedings of trustees and officers of dissenting chapels. The power of the trustees to sell chapel premises would depend on the deed creating the trust. The trustees would hardly be justified in selling for any purpose, however beneficial, unless an express authority be conferred on them by the trust instrument.

G.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

EXECUTORS.—Leaseholds—Indemnity in respect of covenants in leases.—Where leaseholds have been specifically bequeathed by a testator (lessee) and they are insufficient to indemnify the executors, they (the executors) are entitled to indemnity out of the general estate against the covenants in the leases; if the specific legatee cannot give a sufficient indemnity. The above rule also applies where the leaseholds have been sold by the direction of the court, but not where the testator was only an assignee, as then there are no future liabilities against which the executors can require indemnity. *Garratt v. Lancefield*, 27 Law Tim. Rep. p. 12; 2 Jur. N. S. 177.

EXECUTORS.—Expenses of obtaining probate—Proctor must look to the executor and not come on the estate—Testamentary expenses, when directed by the will to be paid.—When an executor or executrix employs a proctor to obtain probate of the will, the costs of obtaining that probate, including, of course, the amount paid by the proctor for probate duty, form a debt of the executrix, and the proctor may sue her, and recover the amount from her, but, as a general principle, there is no lien upon the estate of the testatrix; that is to say, it is not at all a matter of course that the proctor may pass over the executrix, and omit insisting upon his right against her, by coming to the court administering the deceased's estate to ask that the amount of his charges should be paid out of the estate of the testator. As a general rule, where the executor is indebted to the estate of his testator to an amount equal to or exceeding the amount due for testamentary expenses, those expenses are not a charge upon the estate for the benefit of the person to whom they are due. But where the will directs the testamentary expenses to be paid, those expenses are a charge upon the estate. *Tanner v. Carter*, 2 Jur. N. S. p. 413.

FEME COVERT.—Equity to a settlement, whole fund settled [1 Chron. pp. 9, 87, 200, 273, 372, 459]—Where a husband had ceased for several years to reside with or maintain his wife, having only allowed her £4 in the preceding twelve months and she had three children to support, the court ordered the whole of a fund of £550 to be settled on the wife and her children, there having been no settlement on the marriage. *Re Disney*, 2 Jur. N. S. p. 206.

JURISDICTION.—Removal of Impediments to trial at law—Ejectment—Surprise—Agreement to take a lease—Judgment by default.—Plaintiff, being in possession of certain lands as absolute owner, was served with a writ of summons in an action of ejectment. Being, as he stated, illiterate, and unable to

read the writ, and being misinformed as to its nature, he suffered judgment to go by default. Afterwards, to avoid being turned out of possession, he signed a memorandum of agreement for a lease whereby he agreed to take the farm from the defendant (who was plaintiff in the ejectment suit) for four months at a fixed rent. He then attempted to set aside the judgment on the ground of surprise, but was met at law by the objection that he had waived all irregularities by attorning to the defendant. The bill prayed for a declaration that the plaintiff was entitled in fee simple in possession, that the memorandum might be delivered up; and for an injunction to restrain the defendant from proceeding at law, either upon the memorandum or the judgment: Held, that the jurisdiction of the Court of Chancery extended to remove any impediments to the fair trial of the real question at law; but did not extend to the trial of that question, semble, if explanation of the nature and effect of a writ upon service be dispensed with by the provisions of the C. L. P. A., and any surprise were to arise in consequence, the Court of Chancery would relieve against such surprise. The evidence of surprise in this case failing, the bill was dismissed with costs, except so far as it prayed an injunction to restrain the defendant from making use of the memorandum and judgment. *Griffiths v. Edwards*, 27 Law Tim. Rep. p. 18.

MORTGAGE.—Mortgagee's costs [ante, p. 344]—**Costs of transfer.**—Where a mortgagee, without the concurrence of the mortgagor, and without first calling upon him to redeem, assigns the mortgage, he is not entitled to add the costs of such transfer to his mortgage security. *In re Radcliffe*, 2 Jur. N. S. 387.

MORTGAGE.—Fixtures—17 & 18 Vic. c. 36—**Bill of Sale of fixtures, filing.**—The old rule of law was very strict with respect to fixtures. Anything that had been once attached to the soil with nails or screws by the owner of the freehold, as between the heir and executors, passed with that to which it was so attached, the owner being considered to have thereby expressed his intention that the character of what would otherwise have been deemed a mere movable chattel should be changed. This rule has been relaxed in cases between landlord and tenant, such relaxation being clearly for the benefit of trade, it being most unreasonable that where the tenant has placed valuable property upon the soil for his own purpose, the landlord should be allowed to take it at the end of the tenancy. The case in *Fisher v. Dixon* (12 Cl. and Fin. 312), was of an owner, not of a tenant; which depends on principles very different from those applicable to fixtures as between landlord and tenant. This disposed also of *Hellawell v. Eastwood* (6 Exch. R. 295) in which

it did not appear that *Fisher v. Dixon* was cited. As to the cases which have arisen on a *fi. fa* by the sheriff, the sheriff has the right to seize ordinary house fixtures, but not when the freehold is in the debtor, and he has affixed them to it (*Wynn v. Ingleby*, 5 Bar. and Ald. 625; *Place v. Tagg*, 4 M. and By. 277; and *Hallen v. Runder*, 1 Cr. M. and R. 206). Under a mortgage by the owner in fee of the land, mills or factories, dwelling houses, and hereditaments, in his occupation as a copper roller manufactory, and also of the steam engine, boiler, millgear, millwright work and machinery then or thereafter to be fixed to the said lands, &c., together with all fixtures, &c.: Held, as against the assignees in bankruptcy of the mortgagor, that all machinery which was affixed to the freehold and would have passed to the heir and not to the executor, had passed to the mortgagee under this deed. Cisterns and machines standing by their own weight, and not fixed to the ground, not included. The Bills of Sale Registration Act 17 & 18 Vic. c. 86, has no application to a conveyance of the whole freehold. *Mather v. Fraser*, Week. Rep. 1855-6, p. 387.

PUBLIC COMPANY.—*Lands Clauses Consolidation Act, 1845*—*Water-works Clauses Act, 1847*—*Stream taken or used or injuriously affected*.—Under the Water-works Clauses Act exactly the same distinction holds good with respect to the mode of payment of the value of streams "taken or used or injuriously affected," which is established by the Lands Clauses Act in the case of lands. Where a stream is diverted, it is taken or used "within the meaning of these acts and payment of the value must be made or secured to the owners and occupiers of all the lands through which it passes, before the diversion can be made? Semble, that a stream into which the stream diverted used to flow, would be injuriously affected" by such diversion. *Terrand v. The Corporation of Bradford*, 27 Law Tim. Rep. p. 11.

EQUITY PRACTICE.

ANSWER.—*Insufficient*—*Trustees*—*Disposal of property, particulars of*.—Trustees and executors, in their answer to a bill filed for the administration of a testator's estate, said that the testator had, by deed of a certain date, conveyed part of his property, but refused to say to whom, or on what trusts: Held, the answer was insufficient. *Major v. Arnott*, 2 Jur. N. S. 387.

ADMINISTRATION SUITS.—*Staying proceedings in other suits*.—The usual practice on restraining a creditor who sues an executor or administrator at law, is to order the executor to make an affidavit as to the money in his hands, and there appears no reason why the same should not be done in favour

of creditors who are stayed from proceeding with a suit in equity. But it makes a difference where there is the additional fact that the creditor suing the executor in equity alleges that the vouchers and documents necessary to prove his debts are in the hands of the executors. An administration suit was commenced by a creditor, the bill alleging that the documents to prove the plaintiff's debt were in the possession of the defendants, the executors. Subsequently, and after having obtained further time to answer, two of the executors filed a bill against the third, who was also beneficially interested in the residue. They obtained a common decree before putting in an answer, and applied to stay proceedings in the other suit. The motion ordered to stand until an answer should have been put in *Macrae v. Smith*, Week. Rep. 1855-6, p. 472.

VARYING DECREE.—*Order to tax solicitor's costs*—*Taxing-Master General*—*Accounts*—*Varying decree by motion*.—In *Jones v. James* (1 Beav. 307), it was decided that under the common order for taxation of costs the Master was not authorised to take an account of pecuniary matters between the parties unconnected with the bill of costs; and in *Re Smith* (4 Beav. 309), the same rule was acted upon. It is quite contrary to the practice of the equity courts to vary on motion what has been done by decree. The proper course is either to rehear the cause, and set the decree right, or to wait for the hearing on further directions, and remedy the error by a fresh order. But no supplemental order can be made upon motion, decrees being made, not merely for the purpose of declaring rights, but of directing how those rights are to be carried out. These observations will explain the following decision:—By the decree in a suit by a client against his solicitor, it was referred to the taxing-master to take an account of the general money transactions between the plaintiff and defendant. Afterwards the plaintiff applied on motion for an order that, notwithstanding the decree, the general money transactions should be referred to the taxing master: Held, first, that this was a variation of the decree, and could not be made on motion. Secondly, that the general money transactions, not being connected with the payment of the bills of costs, it was not within the province of the taxing master to take the accounts of them. *King (John) v. Savery*, Week. Rep. 1855-6, p. 471.

BANKRUPTCY.

PROTECTION ACTS.—*Making over estate before petitioning the court*.—Where a man disposes of his estate without paying his creditors, a clear case is made out against him under the protection acts. *Re Currey*, 27 Law Tim. Rep. 20.

CREDITORS' COMPOSITION DEED.

Limited time for execution—Principles of construction
—*Raworth v. Parker* (ante, p. 307).

We have before noticed, at some length (vol. 1, pp. 167-170), the subject of Voluntary Conveyances for the benefit of creditors, so far as relates to the question of their revocability. In accordance with our practice of rendering this work as complete as possible, we now call attention to another of the doctrines relating to composition deeds, viz., the operation of the common clause, excluding from the benefit of the deed, creditors who do not execute or come in under it within a limited time. This subject was considered by V. C. Wood, in the recent case of *Raworth v. Parker* (Week. Rep. 1855-6, p. 273; 27 Law Tim. Rep. 62), the circumstances of which are stated ante, p. 307. The V. C. laid down as a rule in equity that, although composition deeds may contain provisos that they are to be executed by the creditors within a limited time, they are nevertheless to be construed with latitude; and it is not necessary in equity for a creditor to seal and deliver the deed, provided he indicates, within due time, his assent to the terms of it, and his intention to act under it. His Honour observed, that Lord Eldon in the case of *Spottiswoode v. Stockdale* (Coop. 102), "has decided that it cannot be alleged by the debtor that the deed, although void at law, is not sustainable in equity, upon the ground that there is a provision in the deed that it is to be void if all the creditors who have not securities do not sign it within a given time, and it is shown that certain creditors who had no securities have not assented to it within that limited period. Lord Eldon admitted, upon the state of facts, that the deed was void at law, but he said it was clearly sustainable in equity, the trustees having acted under it. That authority, however, does not go beyond this—that it is not competent for the debtor himself to dispute the validity of the deed in equity. The cases show that the courts of equity are not strictly bound by the legal effect of instruments of this description, but give assistance to parties where it has been acted upon. This is the whole extent of the authorities. There are no modern authorities which show relief to have been given where a time has been fixed within which the deed was to be executed. In the later authorities there was a strong indication of opinion by the court, although nothing more than dicta on the subject, that time is in such cases an essential ingredient, and that parties who do not bring themselves within that condition will be excluded from the benefit of such instruments. It was said that creditors who executed at a particular period might

have been induced to do so from the notion that a larger dividend was to be distributed among a small number of creditors, and that it would be unjust to those parties if afterwards they are to have other creditors let in upon them, and that this would have to be considered in deciding on the admissibility of a creditor after the time named. Practically, however, this case does not assume that aspect. This composition deed was signed by the bulk of the creditors, who had to sign before the last day. It might be, however, matter worthy of consideration how that could affect the question. None of the later authorities went the length of the case of *Dunch v. Kent* (1 Vernon, 260). There the court held, that although not within the year, the creditor was entitled to have the benefit of the deed. If the creditor is to be held not admissible after the period, *Dunch v. Kent* must be overruled. But let us consider the purport of deeds of this nature. Why is equity to give an enlarged construction to them? Because it must be assumed that the debtor must clearly wish the whole of his creditors to participate in the fund available for payment. He can not, or ought not, and therefore must for the present argument be held not to wish to exercise any fraudulent preference. The court cannot attribute to him any other intention than that all his creditors should be provided for. It is obviously for his benefit to get the largest number to come in. It is also for the interest of the body of creditors themselves to be included in the provisions of the deed, because they so get a more speedy distribution. It seems upon principle, too, that it should not be competent for creditors to exclude a *bonâ fide* creditor to whom no improper intention can be attributed. What is the duty of trustees of such a deed? They being creditors themselves, it cannot be permitted that they should keep the deed in their pocket; that would be most improper. In their advertisement they did not tell the creditors (which took the case out of the reach of the argument as to the creditors signing or not signing according as there were more or less in number who had executed it)—they did not tell the creditors, if you execute it on the 22nd July you will have the benefit of it, and nobody else; but they said, all who do not execute upon that day, or upon such other day as the creditors may desire, will lose the benefit of it. Every one knew that the trustees had the power of extending the time thirty-days. That fact got rid of the objection of creditors executing it on the faith of subsequent creditors not being let in. They knew that the plaintiff was abroad; that he was a very large creditor; that he had absconded, and was not likely to be very easily found; they knew that his friends were very anxious—for whatever reason—that he should be let in to

have the benefit of the deed. The demand was made upon them at a proper time, as soon as he was aware of it, and when they clearly had power to extend the provision as to the period of admission. I do not think it quite so clear that they could extend it afterwards. Knowing these facts, it was plainly the duty of the trustees to have enlarged the time. The case, in all other respects, is free from difficulty. There was no difficulty suggested as to extending the time by reason of inconvenience from delay; there was no necessity shown for immediate distribution; no dividends were shown to be ready for distribution; nothing had been done, and nothing remained to be done, to prevent this creditor from bringing himself within the full benefit of the deed. Under these circumstances it would be departing from every equitable principle which ought to govern the court in construing deeds of this description, to hold that parties who are themselves creditors—it would amount to something worse than disregard of their duty as trustees, and would be unjust and improper to allow that they may say that they will exclude a creditor whom they know to be abroad. I have no wish to impute any wrong intentions to these individual trustees, who were acting for the whole body of creditors, nor do I mean to intimate that they might not have felt some difficulty as to the course they were to take. At the same time, when they were informed that there was this large creditor, when they knew that he was at such a distance, and that there was every probability he might not have heard of the design, and they had in their hands the power of giving him an opportunity of executing the deed, it was their common duty to have allowed him to do so. On these grounds, even assuming the point of law to be in the defendants' favour as to the extension of time after it had expired, and not assuming a single fact, except the power of attorney, the plaintiff must be declared entitled to be admitted to execute and have the benefit of the deed.

SOLICITORS AS TRUSTEES.

Committing breach of trust—Striking off Rolls.—There have of late been many successful applications to strike solicitors off the roll on the ground of misconduct, and it cannot be too well known that the courts will so act towards a solicitor who having been a trustee has so dealt with the trust funds, that they have been lost. In the case of *Re Chandler* (27 Law Tim. Rep. 61), the Master of the Rolls struck off the rolls a solicitor who having been a trustee of a marriage settlement, sold out the trust fund, and applied the proceeds to his own use. The counsel of the solicitor, Mr. Chandler contended

that the breach of trust committed by him was an act done by him in the character of trustee, and not of solicitor, and that, therefore, there were no grounds for striking him off the rolls, but the Master of the Rolls observed, that these cases were very painful, but he had no option as to the course to be taken. It was said Chandler was not the solicitor of the trust, and had not charged any costs against the trust estate; but he was a trustee, and so far as a solicitor was required, he had acted; at least, there was no other solicitor. He knew it was a breach of trust to sell out the stock; he knew he could not, do so without the consent of his co-trustee, and knowing this, he induced his co-trustee to sign the power of attorney to sell out the stock, obviously for his (Chandler's) own purposes, he having no mortgage or investment in view at the time, and he kept the money at his banker's and applied it to his own use. This is a line of conduct which solicitors are bound to avoid; they are placed in a position of high trust, and it is very rarely that the court is called upon to call them to account in this way, or to visit them with penalties. But for that very reason they are commonly appointed trustees, because the fact of their being solicitors of this court gives them a stamp which marks them out as trustworthy persons in whom confidence may be reposed without hesitation. I cannot, therefore, allow this gentleman, who has shown his unfitness for the office he holds, to remain in a situation to do injury to others who might be induced to trust him; and, therefore, though there is the extenuating circumstance in his favour that the fund is not wholly belonging to other persons, I must strike him off the rolls of the court.

SCOTCH AND IRISH LAWYERS.

Ferguson—C. B. O'Grady—Macnally—C. J. Bushe—Downes—Plunkett—Lord Clare—Grattan.

WE are accustomed to hear and read so much of English judges and lawyers, that we think our readers will not be sorry to have their attention called to some rather rambling, it is true, but not the less interesting notices, of some of the Scotch and Irish lawyers, which we take from "Recollections of a deceased Welsh Judge."

Ferguson.—On our circuit we have had brethren coming from the two sister kingdoms of Scotland and Ireland. Ferguson, since gone to India, where he is making, I hear, a large fortune, was of the former class, though he had never been at the Scotch bar. But Ogle belonged to the latter country, and he too is now thriving in India. Ferguson was an excellent fellow, full of talent, little

read in his profession; owing, indeed, the reading he had to the accident of having been imprisoned under sentence for a seditious riot at the state trials at Maidstone, where he and Lord Thanet were charged with having aided in a rescue of the prisoners just acquitted, but detained on a new charge. Ferguson always spoke of this conviction with a bitterness foreign to his nature, as does Lord Thanet to this day; but Ferguson used to give us anecdotes of the Maidstone trial, which were amusing. Thus Sheridan being called for the defendants, Garrow cross-examined him, and happening to dislike the answer he got, was using the ordinary form of palaver in repeating the question, "perhaps I don't make myself understood?" "Certainly you do not," said Sheridan coolly enough. "Oh! then," and Garrow repeated his question in a different form; but still the desired answer came not; whereupon he said in the accustomed palavering manner—"It is perhaps my obscurity and confused way of putting it?"—Sheridan bowed assent in a marked manner, which excited loud laughter, as he added, "exactly so." Abbott, now Chief Justice, was called for the Crown, and Erskine cross-examined him. Fugion, the Bow street runner, had just been examined. Abbott gave a shuffling answer, which drew from Erskine the only harsh word, Ferguson said, he had ever heard from that great and mild-tempered man. "Sir, I should have been ashamed of the Bow Street runner if he had given me an answer like that." Abbott, Ferguson said, looked furious, and never forgot or forgave the blow.

C. B. O'Grady—Macnally.—The Irish bar and bench are, I believe, high in point of talent, and respectable in learning; but they have no powers of correctly doing their business. It is all haphazard from what I have seen of them; but no one can deny them great readiness and eloquence; and their wit is renowned. But their wit is not confined to the bar as it is with us, unless on very rare occasions—"few and far between." On the contrary, the Irish bench, if not the fountain of wit, is, at least, one of its reservoirs; it is a main through which wit flows freely and copiously. I have heard of numberless instances, like the one I formerly recounted, of Sir Frederick Flood's "unfortunate client," which, by the way, I ascribed to Lord Chief Justice Downes; whereas it was Lord Guillemores (Chief Baron O'Grady's). With his strong Limerick brogue; his quickness of repartee; his unscrupulousness of offending against strict decorum; he really seems to have been among the most accomplished of jokemongers. His sarcasm was often so sly that it went over the head of his victim, but was perceived and relished by the by-standers. Thus,

when one rather of a silly nature was complaining of his son's obstinacy, and calling that near relative a "complete mule." "No doubt" (said O'Grady) "he has a title to the name, both personal and hereditary." But his victim asked, "How could a mule beget a mule?" "No, truly," answered he, "but every mule must have a father." Macnally, a vulgar man, and therefore ever fond of keeping high company, was once showing off about his dinners at Leinster House, and would bring on the subject by affecting to complain of their plainness and scantiness. "How so?" said the Chief Baron. "Why," says Macnally, "for instance, yesterday we had no fish at table." "Probably," said my Lord, "they had eaten it all in the parlour;" so fine was his wit. But in more broad jesting Chief Baron Patterson was at least his equal. He once addressed a Grand Jury on the state of the country, then disturbed by the cabals, intrigues, and squabbles of the great rival powers or families of Agar, Flood, and Bushe. "It is truly painful," said his Lordship, "to contemplate; but how can it be otherwise when the land is flooded with corruption, each man eager only for place, and every bush conceals a villain?" Macnally was one of the greatest romancers ever known even in Ireland. I have heard men say that he had, by some awkward, not very sober, or any very temperate scrapes, lost the whole of one thumb and a moiety of another finger, and they used to ask the *how* and the *when*, to each of which interrogatories he would put in a totally different answer; till at last, getting quite confused, and half-recollecting his former accounts of the matters in question, he got furious, and said he had wholly forgotten all about it. Another time Macnally went to Mr. Parsons, one of the wits of the bar, when his son, a somewhat disreputable character, had been robbed: "Well (said M.), have you heard of my son's robbery?" "No," answered Parsons quietly, "No, who has he been robbing?"

C. J. Bushe.—The learned and most able Chief Justice whom I have just named (Bushe) was kept many years Solicitor-General by the reluctance of Saurin to resign his Attorney-Generalship, and Downes his Chief Justiceship, both dreading to see a Whig succeed. One day at the Lord Lieutenant's table, his excellency fell to praising Downes as an able judge, to which the Solicitor-General assented. He then spoke of his manners as a judge and a gentleman—the same full assent. He then dwelt on his suavity of temper in all positions, public and private. To this Mr. Solicitor could only agree. Next his excellency spoke of his great virtues as undeniable, and without any exception. Mr. Solicitor could not go quite so far. He said, "Why, yes, generally speaking; yet perhaps—" "Perhap

what?" said the wondering Viceroy. What can be the exception to his virtuous character—his most pure character?" "There is one virtue in which he is deficient—I mean *resignation*." All mankind knew that he had remained far too long on the bench, and ought to have retired much earlier.

Downes.—Downes and Burton both were Englishmen, and went over to Ireland, the latter when forty years old. Both began like many barristers formerly, and some in our day, by *noting briefs*, or helping by abstracts, the leaders in full practice. Downes was never married, but had, for the sake of society, living with him two maiden sisters of Hussy Burgh—aged ladies of extraordinary starchness and old fashion, the aunts of Sir Ulysses, on whom he got the title settled after him; for Sir Ulysses was in no way related to the Chief Justice, excepting through his two maiden aunts; if playing piquet or whist with his lordship can be called relationship. I do not imagine such a descent or limitation of a title was ever known in any other country but the one where all irregular things are done. Of Downes, Curran always expressed the lowest opinion. I have heard him describe his mind as a quagmire; and say, moreover, that half of what passed before him in court he could not hear, and much more than half of what he heard he could not comprehend. He had hardly any recommendation but a fine person and a most judicial aspect, which many scrupled not to call an *imposing* appearance, for it was calculated to make the spectator fancy he had some capacity, which he had not. His want of resignation was seen still more plainly when Plunkett was in office. Then Downes seemed screwed down to the bench, as Curran said, "like a log."

Plunkett.—I place Plunkett very far above all the Irish and almost all the English speakers I have ever heard; and I have heard the best of both countries. But I never heard Plunkett at the bar, where I consider he must have been very great indeed. His perfectly logical head—his sustained force of reasoning—his entire neglect, amounting to an apparent contempt of every thing but the matter in hand—the cause; his superiority to tinsel and all finery, like a kind of abhorrence—even without his own most chaste imagery, most apposite comparisons, happy illustrations, and occasionally, but very rarely, admirable jokes—these perfections place him in the very first line of orators among those of all ages; and these perfections are in a most peculiar manner suited to command the greatest success at the bar, whether before the court or the jury. Of his wit, sometimes approaching to drollery, and the effect heightened by its contrast with the peculiarly grave aspect and manner of the man, I have seen both in Parliament and society instances not very easy to

repeat with success, because depending much on the circumstances and the humour of the person at the moment. There was, however, one quality that always marked them—they had something inexpressibly odd and wholly unexpected, and they came very easily into play. I remember once on a legal question in Parliament, he was speaking of the *bastard eigne* and *mulier puise*; he said, "the child after marriage, whom the law in its wisdom is pleased to call the *mulier*, and might as well have called the *ostrich*." I never saw the lawyers present more merry, except perhaps when Windham in his admirable and unreported speech on the Walcheren inquiry, said, "Talk of a *coup de main* in the Scheldt! You might as well talk of a *coup de main* in the Court of Chancery!" At that moment the Master of the Rolls (Sir William Grant) entered, and took his seat, looking as grave as usual. But the gravity lasted not long; the shot told on him, and he rolled about on his bench almost convulsed with laughter. The speech was unreported, because Windham had offended the gentlemen of the press, whom a judge once called our Lord the King of the Press. He had on a recent occasion of some complaint about misreporting, dared to say that he only wished they would let him alone and not report him at all. They took him at his word during the greater part of the session. But to return from my ramble, alas, the only one I can now enjoy since our Welsh tours of little work and much play have been abolished. I remember once when some one said that he had seen a brother of Leach's (the Vice Chancellor), and that his way of speaking and his whole ways, were so like those of his Honour, that the manner seemed to run in the family; Plunkett, who was present, said "I should have just as soon expected to see a wooden leg run in a family." It was this perfect appropriateness, and at the same time perfect unexpectedness, that gave such point to his jests, as well as to his more severe illustrations. Natural without being obvious, the description somewhere given of fine writing, peculiarly applies to him; so does that other description, right words in right places, apply to his style, which is quite perfect.

Lord Clare—Grattan.—I forget whether it was Plunkett or Grattan, who said of Lord Clare, the famous chancellor, that he was a dangerous man to run away from. But I have often recollected the sentiment as well as the phrase, and thought how much it applied to the Irish men of loud valour. Lord Clare, formerly Fitz-Gibbon, was a very able man and a good and even powerful advocate, but little of a lawyer. As a minister in difficult times he shewed great firmness and vigour. I remember Grattan (who had fought a duel with him) thus spoke in his usual picturesque language and yet

drawing tones:—"Clare was an honest man, but no friend to Ireland. Foster was a knave, but he would do a job for Ireland!" and one plainly saw that Grattan, from love of Ireland, preferred the knave to the honest man. Grattan was, we all know, full ready to, "go out," as it is technically termed, in Ireland especially; so the Government of the day once deemed it advisable to have "a man" ready for him. A bullying ruffianly fellow was accordingly, in that *virtuous* administration, brought into Parliament; and all men were aware that his mission was not so much to represent the people as to "take off" the peoples favourite. He made an offensive bravo kind of speech, saying, "Whichever way he turned his eyes,—to the north, to the east, to the west, to the south,—he viewed with alarm the consequences of Mr. G.'s deeds." "Ay," answered Grattan, "the member has looked all around him, and to the north, east, west, and south, and with alarm. Perhaps he saw in the course of his survey the gallows!"

EXAMINATION QUESTIONS.

(Easter Term, 1856).

PRELIMINARY.

I. Where, and with whom, did you serve your clerkship? II. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. III. Mention some of the principal law books which you have read and studied. IV. Have you attended any, and what, law lectures?

COMMON LAW.

I. What is the mode of proceeding in the case of a defendant residing within the jurisdiction of the superior courts, who wilfully evades personal service of the writ of summons? II. Is the service of the writ of summons confined to any particular county? III. For how many months is the writ of summons in force? IV. Define a plea by way of *traverse*, and a plea by way of *confession and avoidance*. V. What is put in issue by the plea of "never was indebted" to a common count? VI. Can a defendant demur to a declaration which though informal is good in substance? Give your reasons for your answer. VII. From what time does the Statute of Limitations in an action for the breach of a simple contract begin to run? VIII. What is required by the Statute of Frauds to make a contract for the sale of goods, for the price of £10, binding? IX. In what case is an infant responsible for the breach of his contract? X. What do you understand by the legal maxim—*Actio personalis moritur cum persona*? and by what recent enactment has this maxim been

qualified? XI. A. obtains judgment against B., to whom C. is indebted,—how can A. obtain the benefit of this debt? XII. State some of the grounds upon which a new trial is usually granted? XIII. What are the steps to be taken by the holder of a bill of exchange to entitle him to sue the indorser upon the bill? XIV. What are the chief distinctions between cases of libel and slander? XV. What is the foundation of the action at the suit of a parent for the seduction of his daughter?

CONVEYANCING.

I. Define a base fee. II. A. is tenant for life of freehold land, and B. is tenant in tail in remainder. How is B. to acquire an estate in fee simple in remainder? III. Define an incorporeal hereditament, and give some instances. IV. Define an estate in tail general, and an estate in tail *male* special. V. Freehold land is limited to such uses as A. may appoint. A. appoints to B. and his heirs, to the use of C. and his heirs, in trust for D. and his heirs. What estates do B., C., and D. respectively take? VI. Define an estate in tail *male* general, and an estate in tail special. VII. Define a chattel real. VIII. A mortgagee in fee dies intestate, and the mortgagor afterwards pays off the mortgage, who are necessary parties to the reconveyance? IX. A. is possessed of a lease for years, and dies, having appointed B. his executor. B. proves the will and dies intestate. By whom may the lease be assigned? X. A. purchases copyhold land from B. What acts are necessary for perfecting the title of A.? XI. A. makes a voluntary settlement on his wife and children of land held in fee, and afterwards conveys to B., who has notice of the settlement, for a valuable consideration. Is B.'s title good? XII. What is tenancy by the curtesy of England? XIII. What are the requisites to the due execution of a will? XIV. A. holds lands on lease for his life, B. holds land on lease for 99 years, if he so long live. What is the difference of the interests of A. and B. in their respective lands? XV. A. grants a mortgage of land to B. in fee, and afterwards desires to grant a valid lease of land to C. for a term of years. Is B. a necessary party to the lease, and if so, why?

EQUITY.

I. Give some account of the origin of the equitable jurisdiction of the Court of Chancery, and from whom it was borrowed. II. Why was the writ of subpoena to answer in Chancery at variance with the first principles of the Common Law? In whose reign was it invented, and by whom, and when, was the writ finally abolished? III. Does equity really mean what its name implies, or in what respect does it differ? IV. Mention some of the cases in which it interposes a relief when at common law no remedy

is found? V. Mention some of the cases in which an agreement is not binding in equity. VI. How are *femes covert* favoured by equity courts? Can a married woman sue there, and how? VII. What becomes of her choses in action when she survives her husband? VIII. In what cases will equity enforce her contracts? IX. Will equity enforce the contracts of an infant for and against him, and if so, how is that to be done? X. What protection do lunatics receive from the same courts, and how is such lunacy to be established? XI. What is the rule of equity courts in the construction of deeds and wills; when there are two clauses absolutely inconsistent with each other, which clause prevails, the first or the last, and is the rule the same in both deeds and wills, and, if different, in what particular? XII. Set forth the several stages of an administration suit down to a final decree, distributing the funds brought into court to the various classes of persons usually entitled when the assets are more than sufficient to pay debts and legacies. XIII. Explain the duties that the chief clerk of the judge has to perform before such a decree can be obtained. XIV. Also the services of the taxing master, and when and how his services are brought into action. XIV. State the changes recently introduced in the mode of taking evidence? How were witnesses examined before the late Chancery Amendment Procedure Act, and how are they now examined.

BANKRUPTCY

I. What are the chief points of difference between the bankrupt and insolvent debtors' laws? II. What are the courts which exercise jurisdiction in matters of bankruptcy? III. What is the general definition of a trader within the meaning of the bankrupt law? and is there any, and if so what, rule as to the nature and extent of trading requisite to render a man liable to the bankrupt law? IV. Is it essential the trading should be carried on in England? V. What acts constitute acts of bankruptcy *per se*? What are the acts with which there must be coupled an intention on the part of a trader to defeat or delay creditors? VI. What are the means by which a trader may, unless he pays his creditors, be compelled to commit an act of bankruptcy? VII. What must be the nature of the petitioning creditor's debt? and in what chief points does it differ from a debt proveable under an adjudication? VIII. Does a judgment creditor of a bankrupt have a preference or priority over the other creditors? IX. Suppose a debt sufficient to constitute a petitioning creditor is due to a single woman, but not payable till after her marriage, upon whose petition and deposition would you proceed to make a trader a bankrupt? X. Is there

any property of a bankrupt which does not pass to his assignees by virtue of their appointment? XI. Can an annuity creditor prove for his annuity? and if so, how? XII. Has a landlord any right of distress against the goods of a bankrupt? State the law on the subject. XIII. State the modes by which a trader may have his affairs arranged under the Bankrupt Law Consolidation Act, 1849, without his being adjudicated a bankrupt. XIV. How are debts payable on contingencies, which have not happened before filing the petition, proved under the bankruptcy? XV. If goods consigned to a trader for sale are found on his bankruptcy mixed with his own stock, do they, or not, pass to his assignees, as goods within his order and disposition?

CRIMINAL LAW.

I. Which of the superior courts at Westminster has criminal jurisdiction? and state generally the nature of that jurisdiction. II. By what proceeding can an indictment found in an inferior court be removed for trial into the superior court? III. State what constitutes the crime of burglary, and what it is necessary to prove in order to convict one accused of that offence. IV. Is the crime of forgery in any case now punishable with death? V. Under what act can bankers and others, be punished for misapplying property intrusted to them? State shortly the provisions of the act. VI. Is the compounding of a felony a criminal offence; what is its nature, and how is it punishable? VII. Can an indictment for conspiracy be supported against a husband and wife only? VIII. What, if any, protection is afforded to a married woman who has joined with her husband in committing a felony? IX. Until what age is an infant considered, in law, incapable of committing a felony? X. Is the evidence of the mother of an illegitimate child held sufficient alone to obtain an affiliation order on the putative father? XI. What is the statute which inflicts punishment for shooting at, cutting, or wounding, with intent to maim or disfigure, or to do a person some grievous bodily harm, and what is the punishment inflicted? XII. What is the least number of witnesses as to each assignment of perjury necessary to convict on an indictment for that offence? XIII. What effect has a conviction for perjury on the civil position of a person convicted of that crime? XIV. Is there any, and what, distinction as to the necessary steps in order to retain a Queen's counsel, or counsel with a patent of precedence, for a prisoner or defendant in a criminal prosecution? XV. What effect has a conviction and attainder for felony on the real and personal property of the convict?

THIRD REPORT ON CHANCERY PRACTICE.

Courts of equity giving damages in suits for specific performance — Examination of witnesses — Registrars.

THE commissioners appointed to inquire into the Process, Practice, and System, of Pleading in the Court of Chancery, have made their *third* report, and as much of what is there mentioned is likely soon to be adopted, we think our readers will be pleased to have a short statement of the matters considered by the commissioners. It will be recollected that the commissioners since their report on the state of the law and of the jurisdiction of the courts in relation to matters testamentary, have principally directed their attention to the mode of taking evidence in the Court of Chancery, introduced by the act for the improvement of the jurisdiction of equity and the general orders made under it; and they have recently considered the course of proceeding adopted in drawing up the decrees and orders of the court. In their first report they stated that they proposed in a future report to discuss the questions of abolishing the distinction between law and equity, and of blending the courts into one court of universal jurisdiction. They stated their opinion, that without abolishing the distinction between law and equity, or blending the courts into one court of universal jurisdiction, a practical and effectual remedy for many evils might be found by conferring upon courts of law and equity such jurisdiction as would enable them to administer entire justice, without obliging suitors in the one court to resort to the aid of the other.

The jurisdiction of the courts not considered.—The commissioners commence by referring to their former reports, and observe, that since various changes have been made in the jurisdiction and procedure, both of courts of law and equity, and that the Common Law Procedure Acts and the Chancery Amendment Acts have to a considerable extent widened the ground common to the jurisdiction and procedure of both courts; and the commissioners think that until the effect of these changes has been more fully ascertained by experience they could not usefully prosecute their inquiries on the general subject of the jurisdiction of the courts.

Extending jurisdiction of equity so as to give full relief without going to courts of law.—The commissioners are of opinion that it would be expedient further to extend the jurisdiction of courts of equity in cases in which the courts grant equitable relief, but in which the relief cannot, according to the present course of the court, be extended to the final settlement of the dispute between the parties. They

give, for example, the case of a person injured by a wrongful act, which would entitle him to damages in a court of law, and to an injunction in equity restraining the further continuance of the wrongful act, who applies for an injunction in equity without previously resorting to a court of law for damages, and observe thereupon that a court of equity, though granting the injunction, has at present no jurisdiction to compel the wrongdoer to make compensation for the injury committed, except that in some cases, in which it can be shown that the defendant has actually derived profit from the act complained of, the court may make him refund his gains. The commissioners are of opinion that in *all cases in which a court of equity interferes by injunction it should have jurisdiction to give compensation in damages for the injury done*, in addition to restraining the commission of the injury for the future, and that such damages should be given although the act complained of may have produced no profit to the wrongdoer. They are further of opinion that a plaintiff obtaining an injunction in equity should not be entitled to proceed at law for damages.

Specific performance with damages.—The commissioners observe that a person entitled to the specific performance of a contract, cannot in general obtain in equity compensation for losses which he may have sustained by its non-performance. They add that it is obvious that the performance of a contract at a time subsequent to that at which it ought to have been performed may be a very inadequate remedy for the injury committed by a refusal to perform it; and they are of opinion that in all cases in which damages could be recovered at law for breach of a contract directed by a court of equity to be specifically performed, the court should have jurisdiction to grant compensation in damages for the loss sustained up to the time of the contract being performed, in addition to decreeing its specific performance.

Other relief where specific performance refused.—The commissioners proceed to say that there are other cases of contract in which the court, without any default on the part of the plaintiff, finds itself unable, from special circumstances, to grant him the peculiar equitable relief of specific performance, in which the commissioners think the court should have jurisdiction to give the plaintiff such other compensation as he ought in justice to have.

Specific performance — Valid contract — Trustee selling trust estate.—As illustrations of the above remark, the commissioners observe that it very frequently happens, in suits for enforcing the performance of contracts, that the court is satisfied that a valid contract has been entered into, and that a court of law would give damages for breach of it,

but that there are particular circumstances in the case, which prevent the court from decreeing specific performance, and consequently it leaves the party complaining to his remedy at law. For instance, a trustee may have contracted to sell a trust estate without disclosing the trust, for an inadequate consideration or otherwise, upon terms which, as between him and his *cestui que trust*, would be a breach of trust. To enforce such a contract against the trustee by decreeing specific execution would be contrary to the established principles of equity, and accordingly the court would decline to interfere, leaving the claimant, who, so far as his own conduct was involved, had a perfectly unimpeachable case for equitable relief, to bring an action in another court for breach of the contract.

Difficulty in saying whether specific performance will or not be enforced.—The commissioners observe that besides the above, other instances might be enumerated; and as the court exercises its discretion in each case brought before it, according to its particular circumstances, it is often difficult to determine before suit whether the contract is one the performance of which can be enforced in equity, or one on which the plaintiff should be left to his remedy at law.

Alternative prayer for specific performance or damages for non-performance.—The commissioners think that it should be competent to a party who, except for such special circumstances as they have adverted to, would in the ordinary course of the court be entitled in equity to a specific performance of the contract, to ask in the alternative that the contract may be specifically performed, or that he may have damages for its non-performance, in case the court should be of opinion that the contract ought not to be specifically performed, and that the court should have jurisdiction to give such damages by way of alternative relief.

Damages not to be discretionary.—The commissioners think that the exercise of the jurisdiction as to damages should not be discretionary with the court, but that the party should be entitled to require the court to adjudicate upon his right, and if his right should be established, to have the amount of damages assessed; and the commissioners do not apprehend that there would be any difficulty in the damages being assessed by a court of equity in such cases as they have adverted to. Such a jurisdiction has been frequently exercised of late years upon applications for a writ of *ne exeat regno*, or an injunction, in which the court has declined to interfere except upon the terms of the applicant undertaking to be answerable in damages in case it should appear that he was not entitled to the relief asked; and has afterwards proceeded to assess the damages.

Damages assessed by a jury.—The commissioners admit that in many of such cases it might be expedient to have the amount of damages assessed by a jury, on an issue *quantum damnificatus*, and power should be given to the court for this purpose, to send such issue to be tried at *nisi prius*, or before the sheriff, or in the county court.

Transferring to bankruptcy court administration of deceased trader's estates.—The questions of transferring to the Court of Bankruptcy the administration of the estates of deceased traders, and of making the commissioners and officers of the Court of Bankruptcy auxiliary to the Court of Chancery, were also considered by the commissioners, and they expressed their views on these subjects in a memorandum laid before the Lord Chancellor in the month of May, 1854. For the reasons therein set forth, they arrived at the conclusion, that an extension of the jurisdiction of the Court of Bankruptcy to the administration of deceased trader's estates would not be beneficial to the public, and that, having regard to the abolition of the office of Master in Chancery and of many formal proceedings in the Court of Chancery, it would not be expedient to make the commissioners and officers of the Court of Bankruptcy auxiliary to the Court of Chancery. And they now state that they continue of that opinion.

Oral examination of witnesses.—The commissioners observe that the Act for the Improvement of the Jurisdiction of Equity, and the General Orders made under it, introduced into the Court of Chancery the system of oral examination of witnesses. The mode adopted was that practised in courts of common law when a witness was about to go abroad. The witness, being sworn before an examiner, was examined orally before him by the counsel or solicitor of the party calling the witness, and cross-examined orally by the counsel or solicitor of the opposite party. The evidence was taken down by the examiner in the form of a narrative, and when concluded was signed by the witness, the deposition so taken being read to the court as evidence when the matter came to be discussed there. The commissioners observe that complaints having been made with respect to this mode of examination principally on the ground of the delay and expense with which it was attended, they took steps to ascertain the practical working of the system, and having considered the objections made to it, embodied their views on the subject in a memorandum laid before the Lord Chancellor in the month of August, 1854. In order to arrive at a proper conclusion on these points the commissioners examined several witnesses, and framed questions, which were extensively circulated, and produced answers and suggestions from counsel, solicitors,

and officers of the court. The recommendations contained in the memorandum were substantially carried into effect by a general order of the Lord Chancellor, made on the 18th January, 1855, which has to some considerable extent removed the evils complained of. The commissioners, however, add that the subject is one of a very difficult nature, and that in their opinion further experience is required before it can be determined with any certainty what is the best system of taking evidence in the Court of Chancery.

The registrars and their duties.—The commissioners next proceed to consider the course pursued in drawing up the orders of the court in the office of the registrars of the court. And they state at great length the constitution of that office, the duties to be performed, and various suggestions for the improvement of the mode of transacting business, to some only of which will it be necessary to refer.

THE STATUTES AFFECTING THE REGISTRARS.

The establishment of the office is regulated by the following Acts of Parliaments:—

Six Registrars and eight Clerks.—The 3 & 4 Wm. 4, c. 94 (1833), which abolished the office of registrar as it had previously existed, and created an establishment of six registrars and eight clerks. The office of registrar had become a sinecure, and its duties were performed by deputy, the officers actually performing the duties, being styled deputy-registrars. At this time there were three Courts of Chancery sitting; namely, the Court of the Lord Chancellor, the Court of the Master of the Rolls, and the Court of the Vice-Chancellor of England; so that there were two registrars for each Court. A clerk was attached to each of the registrars. The remaining two clerks not attached to any registrar were considered to be more especially under the superintendence of the senior registrar.

Two additional Vice-Chancellors.—The 5 Vict. c. 5 (1841), which transferred to the Court of Chancery the equitable jurisdiction of the Court of Exchequer, and created two additional Vice-Chancellors. The number of courts sitting being thus increased to five, the act created four more registrars and four additional clerks, and authorised the Lord Chancellor to appoint further additional clerks, which power was exercised by the appointment of two additional clerks. Thus the establishment consisted of ten registrars and fourteen clerks.

Court of Appeal.—The 14 & 15 Vict. c. 83 (1851), which added a Court of Appeal in Chancery. This act authorised the appointment of one additional registrar only, though an additional court was established. We believe that it was at the time consi-

dered that one additional registrar only was required, it being thought that the Lord Chancellor and the Judges of the Court of Appeal would be rarely sitting at the same time in separate courts. No additional clerk was appointed, but one of the four unattached clerks was attached to the new registrar, thus leaving three unattached.

Succession in the Registrar's office on vacancies.—By Seniority.—Clerks appointed by Lord Chancellor.—Qualification.—Under these acts, whenever a vacancy occurs in the office of registrar or of clerk to the registrars, the vacancy is supplied by the registrar or clerk to the registrars next in seniority, if willing to accept the office, unless some substantial objection is made to such person, in which case the Lord Chancellor determines on the validity of the objection. This right of succession is subject to certain provisions with respect to some of the registrars and clerks to the registrars made on transferring some officers of the Court of Exchequer when the equitable jurisdiction of that court was transferred to the Court of Chancery, but it is unnecessary to state these provisions, as they are temporary only, and do not substantially affect the principle of succession established by the acts. The consequence of the succession thus established in the registrars' office is that on each vacancy a clerk is appointed, who rises gradually by seniority, and many years necessarily elapse before a clerk succeeds to the office of registrar. The average period of service as clerk is stated to be twenty-years. The principle of succession by seniority has always prevailed in the registrars' office. Before the passing of the act of 1833, the clerks were appointed by the registrars (then deputy registrars) by articles of clerkship, and each clerk so appointed continued to serve under the same registrar or his successor, or under one of the other registrars to whom he might be assigned, until he himself succeeded by seniority to the office of registrar. The clerks, instead of being appointed by the registrars themselves, are now, under the authority of the above-mentioned acts of Parliament, appointed by the Lord Chancellor. Each person appointed must be a solicitor, or have served five years under articles of clerkship to a solicitor.

Insufficient office room.—The registrars and their clerks occupy a building in Chancery Lane, which was provided for the establishment when it was much smaller than at present. Few of the registrars have rooms to themselves, and the clerks all sit in one room, which is the common resort of the solicitors and their clerks having business in the office, and which is also occupied by two clerks of entries, and by the two bag-bearers attached to the registrars' office. The two junior registrars and the clerks attached to them have been unable to find

room in the office, and chambers have been taken for them on the opposite side of Chancery Lane.

Registrars attendance in court—Rotation.—A registrar attends each of the courts whenever the court sits, for the purpose of taking minutes of the orders made, and entering the documentary evidence adduced in each case. By an order of the court, dated the 10th of July, 1850, the registrars were directed to attend in court on alternate days, and two registrars were to take each of the six courts week by week in rotation. Each registrar would, therefore, under this system of rotation be at the office every alternate day during the sitting of all the courts, besides those days on which the courts do not sit. The rotation has been somewhat interfered with since the year 1851, when the Court of Appeal was established, especially during Michaelmas and Hilary Terms and the intermediate sittings, when the Lord Chancellor has frequently sat in a separate court from the Lords Justices, and there have been consequently six courts sitting at the same time.

Attendance at the Accountant-General's office.—The attendance of the registrars at their own office is further interfered with by one of them having to attend three days in the week at the Accountant-General's office to countersign his cheques.

Registrar's duties in drawing-up orders—Number and character of orders.—The registrar having taken down in court a note of the counsel attending on each case, the evidence adduced, and the order made, it is his duty to draw up the order in proper form, with such consequential directions as may be necessary, according to the practice of the court and the nature of the case. The number of those orders of the court, which are drawn up by the registrars is very large, amounting to 11,446 in the year ending on the 31st October, 1854, the last day to which returns have been made. Many of these orders are of a special and complicated nature, dealing frequently with property of large amount, declaring and determining the rights of parties under settlements, wills, and otherwise, and directing the mode in which the estates or funds in question are to be enjoyed or disposed of.

Funds in name of Accountant-General.—Where the funds disposed of by any order stand in the name of the Accountant-General, the order contains directions under which the Accountant-General sells or transfers stock, makes payments, or carries over stock or money to different accounts according to the nature of the case. In such cases the orders are necessarily very minute and particular, specifying precisely each particular fund to be affected, and the manner in which it is to be dealt with.

Administration decree where funds in court.—In the very common case of a suit for administering the

estate of a testator when the funds are in court, the order contains directions for payment of creditors and legatees, for carrying over to separate accounts funds to secure annuities given by the will, and for the division of the residue among the persons entitled; each creditor or legatee, and the amount of the fund to be transferred or paid to him, being either particularised in the order or in some document referred to by it, upon which the Accountant-General can act. Where the persons interested are numerous, and their interests are complicated, the order often necessarily extends to great length, and in all cases great care and attention are requisite to insure accuracy.

Payment out of court by cheques.—All payments made out of funds in court are so made by means of cheques drawn by the Accountant-General on the Bank of England, and these cheques are countersigned either by one of the registrars or by an officer of the court lately called the Master of Reports and Entries, whose office has been recently abolished, but the late holder of which still continues to perform his portion of this duty.

Bespeaking, preparing, and drawing up orders.—In order to enable the registrars to draw up correctly the order of the court, a brief held by the counsel in the cause, having his indorsement of the order made, is left at the registrars's office, with other necessary papers, and when the papers are so left the order is said to be "be-spoken." A minute of the order is then prepared, in some cases by the registrar himself, in others by the registrar's clerk. From the minute so prepared the registrar's clerk prepares the draft or the order, and hands it to a stationer employed by the registrar for the purpose of making a full draft of the order for the solicitor of the party who has "be-spoken" it, and of the mandatory part of the order in the shape of a minute, for each of the other solicitors who may require a copy. The solicitors, upon application at the registrar's office, obtain from the registrar's clerk the copies so made. And the solicitor of the party who has "bespoken" the order gives notice to the other solicitors to attend the registrar upon the settlement of the draft, fixing a time when he has a reason to believe that the registrar will be at the office. A paper is put up in the office stating the registrars' names, and the days of their attendance in court and at the Accountant-General's office, so that the solicitor may calculate when the particular registrar, whose duty it is to draw up the order, will be at the office. If the solicitors attend the appointment so made, and there be no dispute among them as to the terms of the order, or in the event of a dispute, if the question can be determined by the registrar, the minutes of the order are then settled. The order is thereupon

given out by the registrar to the stationer, to be copied, and when copied is delivered to the solicitor on his applying for it. The solicitor then fixes a time, as before, for himself and the other solicitors to attend the registrar on the "passing" of the order. Upon the registrar being so attended, any objections which any of the parties may have to the form or terms of the order are stated, and if there be no objection, or if the objections taken are removed, the order is generally left with the registrar to be passed. He then carefully goes through the order, correcting any inaccuracy that may inadvertently have crept into it, and ultimately "passes" it by placing his initials in the margin at the end of the order. The order so passed is delivered out to the solicitor on his applying for it, and he then leaves it with the entering clerk to be "entered" in the books of the court. When this is done, and not before, the order is complete. It is then delivered out to the solicitor on his applying for it.

Time occupied in drawing up orders.—It is obvious that these several steps must necessarily occupy some considerable time; and we are informed that the shortest time in which an order can be drawn up when these steps are taken is ten days. In many cases a much longer time is occupied. It is, however, to be observed that in cases of orders for injunctions or other urgent matters, the order is often drawn up, passed, and entered at once without passing through these several stages.

Ex parte orders.—Orders made *ex parte* are generally drawn up at the office without a settlement of the draft, and without notice to the opposite party, and consequently more speedily than those to which reference has been made. Orders of a simple nature made at chambers are also completed without much delay.

Difference between decretal orders and orders on motion.—A practice has prevailed in the registrars' office for many years, of dividing the duty of preparing the drafts of the minutes of orders in such a manner as that the minutes of orders made on the hearing of the cause, whether originally or after preliminary investigation, and usually called decretal orders, are drawn up by the registrars themselves, while the minutes of orders on petitions or motions are drawn up by the clerks to the registrars. If, however, an order of the latter description is of a very complicated nature, the registrar himself sometimes prepares the minutes. As the registrar's clerks do not ordinarily attend in court, they are obliged to trust to the note taken by the registrars, which is often very short, and to the indorsements on the counsel's brief, which are also of a very concise nature. The minutes drawn up by the clerks are ordinarily issued without

previous communication with the registrar, though the order cannot be passed without the registrar himself perusing and settling its terms. Both the registrars and their clerks seem to consider their respective duties in relation to drawing up minutes as defined by custom and the practice of the office, and it has not been the practice for the clerks to draw the minutes of any decretal order, though they are often merely of a formal nature, nor, on the other hand, has it been the practice for the registrars themselves, except in rare instances, to draw minutes of orders on petitions or motions though of a special nature. The time of the clerks attached to the registrars is greatly occupied with delivering out papers to solicitors and answering their questions, and with matters of a purely formal nature.

The commissioners then proceed to notice the causes of the delays in drawing up orders, and make some suggestions in reference thereto, which we have not space to notice.

Minutes of orders on petitions and motions.—It has been already explained that the minutes of orders on petitions and motions are prepared by the registrar's clerks from the registrar's notes and the briefs of counsel, while the minutes of decretal orders are prepared by the registrars themselves. The registrar's clerks not being generally in the habit of attending court, and not possessing the experience of the registrars, ought not, as we conceive, to be solely intrusted with the duty of preparing the minutes of all orders, on petitions or motions. Many of these orders, on petitions particularly, are of a very complicated and difficult nature, comprising the cases in which a summary jurisdiction has been conferred on the court by various acts of Parliament, *e. g.* the act giving the court power to appoint new trustees in a summary way, and to vest the trust property in new trustees or otherwise as may be requisite: the Trustees Relief Act, authorising trustees to pay trust funds into court, and authorising the court to distribute those funds on petition without bill filed; the various railway acts and other acts authorising public works; besides all private acts conferring a summary jurisdiction on the court. The minutes prepared by the clerks are delivered out without their having previously been submitted to the registrars, and in many cases much delay and expense have arisen from the imperfect nature of such minutes. The solicitor having obtained the minutes, and finding them imperfect, generally consults counsel upon them; and as each solicitor probably does the same, much time is consumed in obtaining the counsel's alterations, in collecting the minutes as altered by counsel, and subsequently

arranging the terms of the order. The minutes prepared by the registrars themselves are 'also sometimes imperfect, giving rise to similar applications to counsel, and consequent alterations and discussion. It is further to be observed that the imperfect state of the minutes furnishes an excuse for delay by parties to whom the order is adverse, and who may wish to postpone the execution of the order, and to throw obstacles in the way of its being drawn up.

Settling minutes of orders.—The minutes of every order on which any question arises are settled with the registrar at the registrars' office; and the practice is for the solicitor having the carriage of the order to give notice to the opposite solicitors to attend the registrar for that purpose at a time fixed by the notice, generally on the first day after the notice is given at which the particular registrar is expected to be at the office. The time of the day fixed for this purpose is generally at some time between 12 and 2 o'clock: and as many minutes have to be settled, and many orders have to be passed at the same time, the registrar is generally, more particularly during the busy season of the year, overwhelmed with these attendances; his room is crowded with solicitors pressing for attention, and much confusion arises, especially when, as often happens, two registrars are sitting in the same room, each pressed by solicitors. It is practically impossible usefully to discuss the terms of a complicated order under such circumstances. But this is not the only difficulty, for if all the solicitors do not attend, the registrar generally declines to settle the minutes, and another appointment must be made. When the second appointment is made, some or one of the solicitors may still be absent, and fresh delay arises. The registrar is naturally unwilling to settle the minutes unless all parties are present, on account of the inconvenience and expense attending the correction of an order when drawn up, if any material error should be discovered in it. The appointments at the registrar's office are not considered peremptory, and they generally take place at the busiest part of the day; and as six courts of equity are sitting at the same time, and as business is transacted at the same time, in the chambers of four equity judges and of six taxing masters, besides the masters' offices and the examiner's office, it is extremely probable that solicitors in extensive practice will be engaged elsewhere at the time fixed. It sometimes, too, happens that a registrar is compelled to be in court or at the Accountant-General's office when he is expected at the registrar's office, and in that event the appointment to settle the minutes necessarily fails.

Evidence referred to in each order.—It is further to be observed, that every order contains a reference to the evidence on which it is made, and particularly notices the documentary evidence, generally specifying the nature of the document and its date, if any, or if the document be referred to as an exhibit, then either specially noticing the mark on the exhibit or identifying the exhibit generally by reference to the affidavit or deposition produced. When a cause is regularly heard at length, and all the evidence produced and read in court, the registrar sitting in court takes down a note of each document as it is handed in; but as it often happens that the evidence is not read at length, in some cases those portions only being read which are material to the points disputed before the court, and in other cases no portion being openly read in court, the registrar has not the opportunity of taking down notes of the documents. In order, therefore, to the evidence being properly entered in the order when drawn up, it is necessary that the registrar should be furnished by the solicitor with a list of the documents to be entered.

Accountant-General's certificate.—Again, a very large proportion of the orders consists of orders to be acted on by the Accountant-General, and before such orders can be drawn up the certificate of the Accountant-General, shewing the exact amount and particulars of the fund in court, must be produced.

Production of briefs of counsel.—Furthermore, before the order can be passed, the briefs of the counsel appearing before the court in the case must be produced, to satisfy the registrar of their having appeared, and where parties are numerous and the solicitors hostile or negligent, great difficulty and delay occur in the production of the briefs.

Material party not before the court.—It sometimes happens that the registrar discovers that some material party has not been served with proper notice of the proceeding, in which case the order cannot be drawn up without the production of a brief for the party omitted to be served, or the matter being brought again to the attention of the court.

All the circumstances not stated to the court.—Again, it sometimes happens that in the opinion of the registrar the order may have been pronounced by the court without all the circumstances of the case having been sufficiently drawn to its attention, or may from inadvertance be contrary to the established practice of the court and in these cases the registrar deems it to be his duty not to draw up the order without the matter being brought under the judge's notice.

Complicated orders, cause delay.—The points to which we have adverted seem to us to indicate the principal causes of the delay in drawing up the orders of the court. In some cases, however, the compli-

cated nature of the order renders it necessary to bestow much time and attention on the details, and in these cases delays are often unavoidable.

Accountant-General's drafts.—Countersigning cheques by the registrar approved.—The commissioners observe that when the Accountant-General draws any cheque upon the Bank except for dividends, the sum for which the draft is drawn is marked in figures in the margin of the order directing the payment, and the Accountant-General puts his initials opposite these figures. It is the duty of the registrar before he countersigns the cheque to see that the cheque is drawn in favour of the person to whom it is ordered to be paid, and that the amount of it corresponds with the sum specified in the order, and he writes his initials in the margin of the order opposite the amount specified. This signature operates as a guard against two cheques being produced to the registrar successively for the same payment. The same course is pursued on the first payment of dividends under an order, but after the first payment the order is not produced to the registrar, so that he simply countersigns the Accountant-General's cheque on its being produced to him. It is the practice in the Accountant-General's office for the Accountant-General to sign the cheques upon his being satisfied that the cheque is drawn in favour of the proper person and for the proper amount. The cheques being so drawn are intrusted to the clerks, to be by them given out to the persons entitled, on their signing a receipt in the Accountant-General's books. These cheques, especially cheques drawn for dividends, may remain some time in the office before application is made for them. In the opinion of the commissioners the practice of countersigning the cheques were abolished, the consequence would be that if a cheque were abstracted from the office, any person might obtain payment for it at the bank at once, and without application elsewhere. According to the present system this could not be done, but the cheque, after it has been received from the clerk, must be presented to the registrar or the master of the reports, and except when drawn for dividends the order must also be presented to one of these officers. The commissioners regard this course of proceeding as a protection against fraud, and they are not prepared to recommend the abolition of such protection, more especially as the Accountant-General is strongly opposed to its removal, and indeed is of opinion that an opportunity should be afforded for performing this duty more carefully than it can be at present done, by the countersigning officer being relieved from all other business during his attendance at the Accountant-General's office. The commissioners think it is of importance that

this duty of countersigning the cheques should still be performed, and they are of opinion that a duty of this nature is better intrusted to a body of responsible and experienced officers like the registrars, acting in rotation, than to a single officer to be appointed for the purpose.

Increase in number of registrars not at present necessary.—The commissioners observe that the Lord Chancellor and the Lords Justices are not sitting in separate courts every day in the week, except perhaps during Michaelmas and Hilary Terms and the intermediate sittings, at which time there is less press of business than at other periods of the year, so that an increase in the number of registrars does not appear necessary on the ground of the constant sitting of six courts. It will be seen that in a subsequent part of the report the commissioners recommend that assistance should be given to the registrars in the discharge of their duties out of court. Should this recommendation be carried into effect, the registrars will be greatly relieved in respect of this portion of their business. The commissioners think it right, however, to observe that, though they do not recommend the appointment of an additional registrar at present, they think it probable that such an appointment may hereafter be required, especially having regard to the progressive increase in the number of orders, and they consider it desirable that power should be given to the Lord Chancellor to increase the number of registrars to twelve, if, after the alterations which it is proposed to make shall have been made, such an appointment should be found necessary. The recent abolition of the office of the Master of the Reports and Entries furnishes, in their opinion, an additional reason for giving such a power to the Lord Chancellor, because the whole duty of countersigning the Accountant-General's cheques, half of which is now performed by the gentleman who lately held the office of Master of the Reports, will, upon his death, devolve on the registrars. The commissioners do not approve of some suggestions made that the orders should be drawn by the solicitors and submitted to the registrars for their sanction; but they think that the practice of the registrar's office, by which the minutes of decretal orders are drawn up by the registrars, and the minutes of orders on petitions and motions by the clerks, should be altered in some respects. They are also further of opinion that each of the registrars should have an assistant clerk, appointed by him and removable at his pleasure, and that the present practice of allowing parties to make their own appointments to settle minutes should be altered. They further recommend that the *solicitors' fees* on settling the minutes

and on passing the order should be consolidated into one fee.

The registrar's office to be kept as hitherto.—The commissioners state that doubts have been expressed whether it is expedient to have a distinct body of trained registrars, and whether it would not be an improvement, on the occurrence of vacancies to select the registrars from among members of the Legal Profession, either Barristers or Solicitors, leaving them to appoint their own clerks. The commissioners think that it is advisable to keep up the registrars' office as a separate establishment, the clerks rising by seniority and ultimately becoming registrars, but the commissioners do not enter further upon the consideration of this general question, remarking only upon this point that a complete change in the system could not be effected for many years to come, on account of the vested rights of the existing clerks. The commissioners think, however, that it would be expedient to make some alterations in the constitution of the office applicable only to future appointments.

Registrars seeing to the payment of legacy and succession duties.—The commissioners say they find that the registrars are desirous of being relieved from the responsibility imposed on them of seeing that funds disposed of under orders of the court are properly discharged from legacy and succession duties; and, they suggest that the court should be satisfied of the discharge before the order is made. The commissioners are, however, of opinion that the practice cannot safely or properly be altered in this respect. The duties are seldom paid or provided for until after the party liable has been declared entitled to the fund, and has obtained an order for payment. In many cases it is not known until after the decision of the court what legacy or succession duty is payable, or by whom it is to be paid. If, therefore, the judge were in every case to be satisfied of this fact, a further hearing for this purpose would in many cases take place, thus causing increased expense and delay. The commissioners consider that the registrar is the proper officer to discharge such duties when imposed by the legislature on the court.

THE EXAMINATIONS AND THEIR RESULTS.

THE number of the rejected at the examinations is now considerable, as the last two examinations sufficiently show. Thus, in Hilary term there were 83 examined, and of these no less than 13 were rejected; and in the last term, viz., Easter, out of 88 candidates there were 11 rejected, or, as it is more delicately termed, *postponed*.

These results ought to have a beneficial effect on future candidates; but it is to be feared that they will go on, as little prepared as heretofore, to take what is called their "chance," it being thought by some that it is luck and not merit that gets a candidate through or causes his rejection. This is a very silly opinion, and the sooner it is given up the better for those entertaining it.

With regard to the present, or *Trinity* term examination, the examiners have issued their usual notice, which we here insert as being useful, not only for those intending to be examined in the present term, but also to those who may hereafter have to undergo the ordeal; and so even solicitors, who may naturally be supposed to take an interest in their articulated clerks, may find it of some service:—

The examiners appointed for the examination of persons applying to be admitted attorneys, have appointed *Tuesday*, the 3rd of June, at the Hall of the Incorporated Law Society, in Chancery Lane, to take the examination, which will commence at 10 o'clock *precisely*.

The articles of clerkship and assignment, if any, with answers to the questions as to due service, according to the regulations approved by the judges, must be left on or before *Wednesday*, the 28th inst., at the Law Society's office.

Where the articles have not expired, but will expire during the term, the candidate may be examined conditionally; but the articles must be left within the first seven days of term, and answers up to that time. If part of the term has been served with a *Barrister, Special Pleader, or London Agent*, answers to the questions must be obtained from them, as to the time served with each respectively.

A paper of questions will be delivered to each candidate, containing questions to be answered in writing, classed under the several heads of—1. Preliminary. 2. Common and Statute Law, and Practice of the Courts. 3. Conveyancing. 4. Equity, and Practice of the Courts. 5. Bankruptcy, and Practice of the Courts. 6. Criminal Law, and Proceedings before Justices of the Peace.

Each candidate is required to answer *all* the Preliminary Questions (No. 1); and also to answer in *three* of the other heads of inquiry, viz.: *Common Law, Conveyancing, and Equity*.

The examiners will continue the practice of proposing questions in *bankruptcy* and in *criminal law* and *proceedings before justices of the peace*, in order that candidates who may have given their attention to these subjects, may have the advantage of answering such questions and having the correctness of their answers in those departments taken into consideration in summing up the merit of their general examination.

Under the new rules of Hilary Term, 1853, it is provided that every person who shall have given notices of examination and admission, and "who shall not have attended to be examined, or not have passed the examination, or not have been admitted, may *within ONE WEEK after the end of the term* for which such notices were given, *renew the notices for examination or admission for the then next ensuing term*, and so from time to time as he shall think proper;" but shall not be admitted until the last day of the term, unless otherwise ordered. This rule has been made in order to avoid the practice of giving double notices.

THE BANKRUPTCY LAW.

(Continued from p. 386).

ASSIGNEE BECOMING BANKRUPT, OR RETAINING MONEY BELONGING TO ESTATE.

If an assignee of a bankrupt himself become bankrupt, and is indebted to his bankrupt's estate, his certificate will not discharge his future effects so far as such debt is concerned. This is by sec. 156 of the Consolidation Act, which enacts, that "if any assignee indebted to the estate of which he is such assignee in respect of money, being part of the estate of the bankrupt, retained or employed by him, become bankrupt, and obtain his certificate, it shall have the effect only of freeing his person from arrest and imprisonment, but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife and children, excepted), shall remain liable for so much of his debt to the estate of which he was assignee as shall not be paid by dividends under his bankruptcy, and for interest at the rate of five per cent. per annum on the whole debt."

An assignee retaining or employing more than £100 of the bankrupt's effects, or neglecting to make any investment directed by the commissioner may be charged twenty per cent. Thus sec. 265, enacts that "if any assignee shall retain in his hands or employ for his own benefit, or knowingly permit any co-assignee so to retain or employ, any sum to the amount of more than one hundred pounds, part of the estate of any bankrupt, or shall neglect to invest any money in the purchase of exchequer bills when directed by the court, every such assignee shall be liable to be charged in his account with such sum as shall be equal to interest at the rate of twenty per cent. per annum on all such money for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed, or during which he shall so have neglected to invest the same in the purchase of exchequer bills; and

the court is hereby required to charge every such assignee in his account accordingly." An assignee cannot be charged under this section for the act of his co-assignee, unless he has knowingly permitted such act. (*Ex parte Benham*, 2 Mont. and Ayr. 272. See also *Ex parte Graham*, 2 M., D. and M. 290; *Ex parte Turner*, ib. 481).

CONTROL OF COURT OVER ASSIGNEES.

By sec. 151 of the Consolidation Act, "the assignees shall be subject to the orders of the court in their conduct as assignees; and it shall be lawful for the court at all times to summon the assignees, and require them to produce all books, papers, deeds, writings, and other documents relating to the bankruptcy in their possession, and to direct them to pay and deliver over to the official assignee all monies, books, papers, deeds, writings and other documents which may have come to their possession or custody as such assignees.

PROOF OF DEBTS.

Payment of debts in full.—Before considering the subject of the proof of debts, it will be desirable to notice those instances in which creditors are entitled to be paid in full, or in priority to the general body of creditors, contrary to the rule that the assets of the bankrupt are to be divided equally among all his creditors. Thus, we may notice that one year's assessed taxes must be paid; if the bankrupt has been an officer of a friendly society, and has moneys belonging to same in his hands, the commissioner may order same to be paid over to the society, as also the payment out of his estate of moneys remaining due in respect of funds received by the bankrupt for such society. The servants and clerks of the bankrupt are entitled to so much of their wages as do not exceed three months, and not being more than £30. The wages of the bankrupt's labourers and workmen (20 Law Tim. 267) are to be paid to the extent of 40s. each. The commissioner may also order any sum to be paid out of the estate in respect of apprentice fees received by the bankrupt with an apprentice (see 12 & 13 Vic. c. 106, ss. 166—170). We proceed to notice the various enactments respecting these matters.

Payment of assessed taxes.—By sec. 186, "the court, out of the estate and effects of the bankrupt, shall order payment of all duties of assessed taxes, assessed on the bankrupt at the time of his bankruptcy up to the fifth day of April next after the same shall have happened (such payment not exceeding in the whole one year's assessment), and the bankrupt shall not be liable to be assessed to such duties after the said fifth day of April in respect of any article kept and used for the purposes

of trade at or before the time of the bankruptcy, which article shall have been seized and surrendered and *bonâ fide* sold under the bankruptcy, and not kept or used by the bankrupt after the said fifth day of April."

Bankrupt being officer of, and having monies belonging to a friendly society.—By sec. 167 of the Consolidation Act, "if any person already appointed or employed, or who may be hereafter appointed to or employed in any office in any society established under any of the acts relating to friendly societies, and being intrusted with the keeping of the accounts or having in his hands or possession, by virtue of his office or employment, any monies or effects belonging to such society, or any deeds or securities relating to the same, shall have been or shall become bankrupt, the court shall upon application made by the order of any such society or any committee thereof, or the major part of them, assembled at any meeting thereof, order payment and delivery over to be made to such society, or to such person as such society or committee may appoint, of all monies and other things belonging to such society, and shall also order payment out of the estate and effects of the bankrupt of all sums of money remaining due which the bankrupt received by virtue of his said office or employment before any other of his debts are paid or satisfied."

The Friendly Societies' Consolidation Act, the 18 & 19 Vic. c. 63, s. 23, contains a similar provision to the above, for it enacts that "if any person already appointed or employed—or hereafter to be appointed or employed—to or in any office in any friendly society established under this act, or under any of the acts hereby repealed—whether such appointment or employment was before or after the legal establishment of such society, and having in his hands or possession, by virtue of his office, any monies or property whatsoever of such society, or any deeds or securities belonging to such society, shall die, or become bankrupt or insolvent, or have any execution or attachment or other process issued against him or any part of his property, or shall have any action or diligence raised against his lands, goods, chattels or effects, or property, or other estate, heritable or movable, or shall make any assignment, disposition, assignation, or other conveyance for the benefit of his creditors, the heirs, executors, administrators, or assignees of every such officer—and every other person having or claiming right to the property of such officer, and the sheriff or other person executing such process, and the party using such action or diligence respectively, shall, upon demand in writing made by the treasurer or by the trustee, or by any two of the trustees of such society, or any person

appointed at some meeting of the society to make such demand, deliver and pay over all such monies, property, deeds, and securities belonging to such society to such person as such treasurer or trustees shall appoint, and shall pay, out of the estate, assets, or effects, heritable or moveable, of such officer, all sums of money due which such officer shall have received, *before any other of his debts are paid*, and before any other claims upon him shall be satisfied, and before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence; and all such assets, lands, goods, chattels, property, estates and effects, shall be bound to the payment, discharge, and satisfaction of such claims."

This section applies only to cases of debts in respect of money received by officers by virtue of their office, and independent of contract. Upon the construction of similar sections to this in the repealed acts, the following decisions were given:—*Ex parte the Amicable Society of Lancaster* (6 Ves. 28), decided that the statute 33 Geo. 3, c. 54, s. 10, giving preference to friendly societies having money due to them from their officers dying or becoming bankrupt or insolvent, does not extend to debts due from them individually, and not in their official character. *Ex parte Ashley, ex parte Corder* (6 Ves. 441), decided where a person in the habit of receiving the money of a friendly society having no treasurer appointed, upon notes carrying interest payable a month after demand, is not an officer of the society, so as to entitle them to a preference under the 33 Geo. 3, c. 54. *Ex parte Ross* (6 Ves. 802), decided that money paid by order of a friendly society from time to time upon notes carrying interest, there being no treasurer appointed, is not money in the hands of the party by virtue of any office within the 33 Geo. 3, c. 54, s. 10, entitling the society to a preference in cases of bankruptcy. *Ex parte Stamford Friendly Society* (15 Ves. 280), decided that the preference given to friendly societies, by the 33 Geo. 3, c. 54, s. 10, over other creditors, is confined to debts in respect of money in the hands of their officers, by virtue of their office, and independent of contract, and therefore does not extend to money held by the treasurer upon his promissory note payable with interest upon demand. *Ex parte Buckland* (1 Buck. 514), decided that the same act only applies to cases where the officer of the friendly society has, by virtue of his office, been entrusted with the monies and effects of the society (and see *Anonymous*, 6 Mad. 98); nor does it apply to bankers appointed to receive money and remit to their London agents for the purpose of investing the same with the National Debt Commis-

sioners (*ex parte* Whipham, 2 Mont. D. and G. 564; *ex parte* Harris, 1 De Gex, 162). Where, however, the bankrupt, on being appointed treasurer, was by the rules to pay interest on the amount in his hands, it was held, that the section applied, as being money in his hands by virtue of his office as treasurer, and that the assignees were liable to pay over the amount to the society (*ex parte* Ray, 1 M. and Ch. 597). Where the treasurer of a savings bank was partner in a bank into which all monies received by the manager were paid to the credit of the trustees, and interest allowed thereon, and the treasurer acknowledged from time to time the balance to be monies in his hands as treasurer, held under a similar clause in a savings bank act to the above 23rd section, that such balance was to be deemed as in his hands as treasurer, at the time of his bankruptcy, and the trustees entitled to recover the amount in full (*ex parte* Riddell, 3 Mont. D. & G. 80). In the case, however, of *ex parte* Jardine (10 Law J., N. S., Bank., 11; 1 Fonblanque, 324), it was held, that an actuary of a savings bank, who by the rules had no power to receive money, but was allowed to do so by the manager, could not be said to have received it by virtue of his office, and therefore, that the trustees of the bank had no priority over the other creditors. Where a joint fiat in bankruptcy was issued against a treasurer of a savings bank and his co-partner, it was held, under the clause in the Savings Bank Act, that the bank could only claim a priority of payment in respect of monies due from the treasurer out of his separate estate, and that they had no claim against the joint estate, although the separate estate was not sufficient to pay the whole amount (*ex parte* Appach, 1 Mont. D. and G. 83). A treasurer of a friendly society took a security in the name of the society from a debtor of his own, retained the amount of his debt out of the society's money, afterwards debited himself annually in the society's accounts, with the interest of the amount for which the security was taken, and then became bankrupt. The security proving insufficient, and not being a security within the Friendly Societies Acts, it was held, that the society was not deprived of the right of priority of payment by reason of not having taken steps to set aside the transaction, or to realize the security before the bankruptcy (*ex parte* Burge, 1 Mont. D. and G. 840). In *ex parte* Orford (1 De Gex, Mac. and Gor. 483), which was a decision upon the 167th sec. of the Bankrupt Law Consolidation Act, where by the rules of the society a treasurer or treasurers were to be appointed, in whose hands were to be deposited all the cash belonging to the society, until the same should be placed out at interest, and as soon as a sufficient

sum should be collected, it was (after leaving in the club box a sufficient sum to pay the sick and other expenses of the society) to be deposited in the hands of the treasurer or treasurers, and the clerk and stewards were to take the same to the bank. No formal appointment of treasurer was made, but the monies of the society were paid into a bank: it was held, that the bankers were not "employed" as officers of the society so as to entitle the society upon their bankruptcy to payment in full. In a recent case (*ex parte* Bailey, Re Barrell, 23 Law J., Bank., 36; 11 Jur. 988; 1 Bank. and Insolv. 235), it was held, that the 167th section of the Bankrupt Law Consolidation Act repealed 4 & 5 Will. 4, c. 40, s. 40 and s. 4 of Benefit Building Societies Act, 6 & 7 Will. 4, c. 32, and Mr. Commissioner Goulburn expressed an opinion that a society, by not taking security from the officer, as authorised by the act and the rules, lost their priority upon his bankruptcy."

VENDORS AND PURCHASERS.

(ante, pp. 133—135, 328—332).

CONDITIONS OF SALE.—*Expense of Assignment of satisfied term, to be paid by purchaser.*—The following case shows the difficulty arising on the framing of conditions of sale so as effectually to cast upon the purchaser, under every circumstance, the costs of obtaining an assignment of terms. On the sale of the P. estate, under an order of court, one of the conditions provided, that if the purchaser should require a conveyance of any outstanding legal estate which should not have been referred to, or noticed in any of the abstracted deeds or other documents dated within the last thirty years, or of any outstanding term, all the expenses attending the getting in and conveyance of such estate, &c., should be borne by the purchaser. The P. estate was in 1823 conveyed to trustees for a term of 1000 years, to secure the payment of a sum of money, the payment of which was under orders of court provided for. The purchaser of the estate required an assignment of the term from the representative of the surviving trustee, on the ground that it was not satisfied, but he refused to pay the costs of such assignment: Held, that the purchaser was entitled to an assignment of the term, the costs of which, not having been provided for by the conditions of sale, must be borne by the vendors. (*Stronge v. Hawkes*, 2 Jur. N. S. 388). In his judgment, V. C. Stuart said: "The question here was, whether what had taken place with reference to this mortgage security, which was a security for a term of years, had made that term of years a satisfied term within the meaning of the conditions

of sale, which spoke of any outstanding terms of years, of which the purchaser might require a conveyance. In this case the term of years was vested in Elizabeth Hawkes, and it was to secure £2,305. By a decree of the court this £2,305 was carried over to a separate account, in order to answer and satisfy the incumbrance, in respect of which the term of years was created. Although there could be no doubt that the carrying over the money by the decree of the court, in order to satisfy this incumbrance, did in a sense make the term of years a satisfied term, yet the question he had to consider, was whether or not this was the case of a purchaser who had required a conveyance of an outstanding term, the expense of which ought to be borne by him, in accordance with the terms of the conditions of sale. The conditions of sale plainly intended, that supposing the purchaser could get a complete conveyance without the assignment of the term, then if, beyond that complete conveyance, he thought proper to call for a conveyance of an outstanding term, the conveyance of which he might or might not require, he should bear the expense of it. The conditions of sale provided, that if a conveyance should be required of something beyond what was necessary, the purchaser should bear the expense of it; but attending to what had taken place under the decree of the court, and giving the fullest effect to the order made, the question was, whether the concurrence of the person in whom the term was vested was necessary, and whether the expense of that concurrence should be borne by the purchaser or by the vendors. He thought it was perfectly clear that the conveyance taken was properly framed, and also perfectly clear, that giving the fullest effect to the order of the court, which satisfied the incumbrance by carrying over the money, the purchaser had not such a conveyance as he ought to have without the concurrence of Mrs. Hawkes, in whom this term was vested. Nobody could advise that the conveyance would be good without the concurrence of Mrs. Hawkes, who was made a party, and therefore she was made to join not only in assigning the term, but in surrendering and extinguishing it. To do this, a proper conveyance, and one which the purchaser had a right to require, was prepared, but it was such a matter as did not come within the terms of the conditions providing that the expenses should be borne by the purchaser; and therefore, he was of opinion that the purchaser ought not to be called upon to bear the expense of this assignment as being part of the ordinary expenses of the conveyance."

EXAMINATION ANSWERS.

COMMON LAW (*ante*, p. 389).

I. *Evading personal service of writ of summons.*—Where a defendant within the jurisdiction, wilfully evades service of a writ of summons, an affidavit of the facts should be made, and thereupon an application should be made to a judge at chambers for liberty to proceed with the action as if personal service had been effected (15 & 16 Vic. c. 76, s. 15; 1 Law Chron. pp. 327, 328, 381).

II. *Writ of summons—Service in county.*—The service of a writ of summons may be in any county, and is not now, as formerly, confined to the county into which the writ was issued (15 & 16 Vic. c. 76, s. 2).

III. *Writ of summons—How long in force.*—A writ of summons remains in force for six months from its date, including the day of such date (15 & 16 Vic. c. 76, s. 11; 1 Chron. 313).

IV. *Pleas of traverse and confession, &c.*—A plea by way of traverse, is where a defendant denies any material allegation of fact in the plaintiff's declaration. A plea by way of confession and avoidance is where the defendant admits or confesses, to some extent at least, the truth of the allegation he proposes to answer, and then states matter to avoid the legal consequence which the other party has drawn from it (*Steph. on Plead.* 229, *et seq.*, 4th edit.).

V. *Never indebted.*—A plea of "never indebted," to a common count will operate as a denial of those matters of fact from which the liability of the defendant arises: thus, in an action for goods sold and delivered, "never indebted" will operate merely as a denial of the sale and delivery in point of fact (*Plead. Rules*, Hil. Term, 1853, pl. 6; 1 Law Chron. 436).

VI. *Demurrer.*—A demurrer to a declaration which though informal is good in substance will not succeed, as by the Common Law Procedure Act, 1852 (ss. 50, 51) the court is, on a demurrer, to give judgment according to every right without regarding any imperfection in point of form, and no pleading is to be deemed insufficient for any defect which could formerly only be objected to by special demurrer.

VII. *Statute of limitations—Beginning to run on simple contract.*—The statute of limitations in the case of a simple contract begins to run from the time of the breach of the promise or the contracting of the debt (*Roscoe's Evid.* 337, 5th edit.; 2 Jur. 196; *Collinge v. Heywood*, 9 Adol. and Ell. 633, overruling *Pullock v. Lloyd*, 2 Car. and P. 119).

VIII. *Statute of frauds—Sale of goods.*—A con-

tract for the sale of goods of the value of £10 must be in writing signed by the party to be charged, or there must have been part payment or acceptance of the goods, &c., (1 Law Chron. 460; ante, p. 348).

IX. *Infant's liability on contract*.—An infant is liable on his contracts for necessities supplied to him, suitable to his station in life (2 Steph. Com. 115, 1st edit.; Key Exam. Anws., div. Common Law, pp. 54, 55; Roscoe's Evid. 325, 5th edit.; 1 Law Chron. p. 308).

X. *Actio personalis moritur, &c.*—The maxim or rule of law, *actio personalis moritur cum persona*, meant that the personal representative of a deceased person should not maintain certain actions in the right of the deceased; the maxim applied peculiarly to actions in form *ex delicto*; indeed it has been observed that this maxim is not applied in the old authorities to causes of action on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law. Thus the executors cannot maintain an action for an assault committed on their testator; nor for a libel on, or slander of, him (3 Black. Com. 302, n. 9; Com. Dig. tit. "Administration," B. 19; Noy's Max. 14; Broom's Maxims, 702, et seq., 2nd edit.; Appx. to Key, Com. Law, p. 86). The above maxim has been greatly modified by the 3 & 4 Will, 4, c. 42, which, by sec. 2, gives an action to the representatives for injuries to the real estate of the deceased committed within six calendar months before his death, and provided the action be brought within one year after his death. The same act gives a remedy against the personal representatives of a party injuring real or personal property within six months before his death, provided the action be brought within six calendar months after administration. Also for accidental killing.

XI. *Obtaining payment from debtor of a judgment debtor—Garnishment*.—The judgment creditor may apply to a judge for an order on any debtor of his debtor to pay the amount of such debt, and on default of payment thereof into court (if the debt is not disputed), execution may be issued against such debtor to the judgment debtor (17 & 18 Vic. c. 125, ss. 60—63; 1 Law Chron. pp. 160, 161, 271, 419).

XII. *New trials*.—New trials are granted for misdirection, reception of improper evidence, or rejection of proper evidence, where the verdict is perverse or against evidence, where the jury have misconducted themselves, if the damages in actions *ex contractu* are excessive, where the cause has been improperly brought on in the absence of the de-

fendant, if there has been a surprise at the trial (1 Chron. 207), and the verdict is manifestly wrong, mistake of the attorney (1 Law Chron. 312). See more fully, Key Exam. Anws., div. "Common Law" pp. 121—123.

XIII. *Holder of bill suing indorser*.—Though the acceptor of a bill be the party primarily liable, yet an indorser is liable to his indorsee for the amount of the bill, and the indorsee is not bound to first sue the acceptor. However, in order to entitle an indorsee to recover against an indorser of the bill, it must be shown and proved that the bill was presented to the drawee or acceptor for acceptance or payment, and dishonoured by him—i. e., that he either refused to accept, or, having accepted, he refused to pay when due, and also that the indorser received from some party to the bill a notice of such dishonour. And the reason is, that the indorser is but as a surety for the acceptor, who is primarily liable on the bill (Roscoe's Evid. 223, 4th edit.; Princ. Com. L. 368—385).

XIV. *Libel and slander*.—A libel is a malicious defamation expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby expose such person to public hatred, contempt, or ridicule, or whereby the party is liable to be prejudiced in the estimation of his friends and associates, and consequently suffers the damage incident to the loss of their friendship and support (2 Harr. and Edw. Nisi Prius, 1349; Princ. Com. Law, 210, 211; 3 Steph. Com. 447, 448, 2nd edit.; Bacon's Abridgm. tit. "Slander," 6 Rep. Crim. L. Com. 77). "If any man deliberately or maliciously publish anything in writing concerning another, which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action lies against such publisher" (*Per Wilmot*, 2 Wilson, 403). Slander differs from libel in its origin, inasmuch as it is by word of mouth, and not like libel, by writing, &c. There is also a great difference in degree as to what constitutes a libel and what slander. Many words which, if spoken, would not be actionable, are actionable if published in the way of libel. Hence the word swindler, if spoken of another—unless it be spoken in relation to his trade or business (1 Law Stud. Mag., N. S., 209), is not actionable (*Savile v. Jardine*, 2 H. Black. 531; *Wilby v. Elston*, 8 Com. Ben. Rep. 142); but if it be published in the way of libel, it is actionable (*TAnson v. Stuart*, 1 Term Rep. 748). Communications fairly warranted by any reasonable occasion or exigency, and honestly made, are denominated *privileged communications*, and for them no action lies (see 1 Law Stud. Mag., N. S., 210; 2 *Id.* 69; *Somervill v. Hawkins*, 15 Jur. 450; S. C. 20 Law Journ., N. S., C. P. 131;

Taylor v. Hawkins, 20 Law Journ., N. S., Q. B. 313). Another distinction between libel and slander is that libels are punished criminally as well as civilly, but mere verbal slander, in general, is not punishable criminally, except it affects the Government or some magistrate, &c.

XV. Seduction.—The foundation of the action for seduction is the loss of services; therefore an action for seduction must be brought by the master, or parent in the character of master, of the girl; but the action would not lie at the suit of the girl herself (for *volenti non fit injuria*), nor indeed of a mere parent, who is, therefore, obliged to prove that his child was in his service at the time the injury was committed (*Hall v. Hollander*, 4 Barn. and Cres. 660; *Blaymire v. Hayley*, 6 Mee. and W. 55; *Davies v. Williams*, 10 Qu. Ben. Rep. 725; S. C. 11 Jur. 752); and indeed there must be an allegation in the declaration of the loss of services, which must be proved, if denied, though it has been holden that the mere residence of the child with her parent at the time affords sufficient proof that the relation of master and servant existed between them (*Jones v. Brown*, 1 Espin. 217). The form of action may be trespass on the case, or, which is more usual, trespass for the breaking and entering, and laying the debauching of the daughter and loss of her services as consequential damages (3 Black. Com. 142; 3 Steph. Com. 540, 1st edit.; pp. 512, 513, 2nd edit.; Princ. Com. Law, 167).

CONVEYANCING (*ante*, p. 389).

I. Base fee.—A base fee is that estate in fee which has a qualification annexed to it by express grant or by construction of law, whereby it is liable to be determined and not merely defeated (see 2 Black. Com. 109; 1 Prest. Est. 432; Key Exam. Ques. div. Conveyancing, p. 27, last edit).

II. Tenant for life and remainderman in tail.—Where there is tenant for life and remainderman in tail (under such circumstances as to make the former the protector of the settlement within the statute); the consent of the former will be necessary to enable the latter (not having the ultimate remainder in fee), to acquire an estate in fee-simple (3 & 4 Will. 4, c. 74, s. 34; 1 Steph. Com. 237, 1st edit.; Key Exam. Quest. div. "Conveyancing", p. 36, *et seq.*).

III. Incorporeal hereditaments.—An incorporeal hereditament is a right issuing out of a thing corporeal (whether real or personal), or concerning, or annexed to, or exercisable within the same, being descendible to heirs. It is not the corporeal thing itself, but something collateral thereto, as a rent issuing out of lands. Some writers rank reversions and remainders as incorporeal hereditaments, and

certainly in respect of the mode of their conveyance they are governed by the rules applicable to the transfer of incorporeal hereditaments. But to include them under such term is to confound the estate which may be had in the subject of property with the subject of property itself. The term is usually confined to things *real*, but it also applies to things personal as in the case of an annuity descendible to a man and his heirs, but as this is the only instance of the kind, the term "incorporeal hereditament" is exclusively applied to the class of things *real*; and may in such case be defined as a right annexed to, or issuing out of, or exercisable within, an hereditament corporeal of that class. The use of the term "incorporeal hereditament" is objectionable, for a man may have a less estate than an hereditament in an incorporeal thing. The preferable term is an "incorporeal right," or better still "mixed property" (1 Steph. Com. 159, 1st edit.; pp. 163, 614, 2nd edit.; 2 Black. Com. ch. 3; 1 Prest. Est. c. 1; First Book, 132, 133; see 1 Law Stud. Mag. 311, 315). The principal incorporeal hereditaments are, advowsons, tithes, commons, ways, offices, annuities, and rents.

IV. & VI. Estates tail, general, and special, male and female.—It will be convenient to answer Nos. 4 and 6 together. Estates in tail are divided into those which are *special* and those which are *general*. An estate tail general is where lands and tenements are given to a man and the *heirs of his body* begotten: which is called tail general, because such donee's issue in general, by every marriage, is, in successive order, capable of inheriting the estate tail pursuant to the form of the gift. An estate tail special is where the gift is restrained to the heirs of the donee's body by a particular person; as where lands and tenements are given to a man and the *heirs of his body on Mary his now wife* to be begotten; here no issue can inherit, but the issue of those two; not such as the husband may have by another wife: and, therefore, it is called special tail. Estates in general and special tail are further diversified by the distinction of sexes in such entails; for both of them may be either in tail male or tail female. As if the lands be given to a man and his heirs male of his body begotten, this is an estate in tail male general; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in tail female special. And in case of an entail male, the heirs female shall never inherit, nor any derived from them. Nor *à converso*, the heirs male, in case of a gift in tail female (2 Black. Com. 118; 1 Steph. Com. 230, 1st edit.; Burt. Comp. 244; Noy's Max. ch. 4; Litt. ss. 23, 24, and notes; *Oddie v. Woodford*, 3 Myl. and Cr. 584; *Doe v. Angel*, 10 Jur. 705, 709).

V. *Appointment to uses*.—For the reasons before mentioned (*ante*, pp. 195, 228), B. would, under the appointment, take the legal estate, C. nothing, and D. would be entitled beneficially (see Co. Litt. 271 b. n. 1, s. 4; Noy's Max. Byth. 307; Key Exam. Quest. div. "Conveyancing," p. 130).

VII. *Chattel real*.—Chattel is a term used to express any kind of property, which, having regard either to the subject-matter or quantity of interest therein, is not *freehold*. Any estate, therefore, in lands and tenements, not amounting to a freehold interest, is a chattel; but inasmuch as it concerns, or according to the technical expression, savours of the realty, it is denominated a chattel *real*.

VIII. *Re-conveyance of mortgage where mortgagee dead*.—A mortgage, whilst redeemable, is *personal* assets in equity; therefore, where a mortgagee in fee dies, his heir or devisee will be a *trustee for the executor*. Thus the personal representative really becomes entitled to the land mortgaged, as well as to the money. However, in order to get the legal estate out of the heir or devisee of the mortgagee, it will be necessary that such heir or devisee should join the executors of the mortgagee in executing a re-conveyance of the mortgaged estate, or that proceedings should be taken under the Trustee Acts.

IX. *Assignment of lease—Lessee dead*.—If the executor of a lessee die intestate, an administrator *de bonis non* to the lessee must be appointed; for the executorship will not pass to an administrator of the executor (see Harrison v. Harrison, 10 Jur. 273; Venables v. East India Company, 12 Jur. 855; Key Exam. Answers, div. "Conveyancing," p. 145).

X. *Copyholds—Conveyances, &c. of*.—To perfect the purchase of copyholds, there must be a surrender by the vendor or other person having the legal estate upon the rolls, and this must be followed by the admittance of the purchaser (Litt. Tens. s. 74. and note; 2 Black. Com. ch. 6; 2 Steph. Com. ch. 83; Doe v. Walker, 19 Law Journ. N. S. Q. B. 293; Key Exam. Answers, div. "Conveyancing," pp. 15—18).

XI. *Purchase with notice of voluntary settlement*.—It has been decided that a voluntary settlement is void as against a subsequent purchaser for a valuable consideration, though the latter had, at the time of his purchase, notice of the voluntary settlement Doe v. Manning, 9 East, 59; 6 Law Stud. Mag. 113; 5 Coke's Rep. 60; Cowp. 278; 3 Madd. 283. Mr. Atherley, in his edition of Sheppard's Touchstone, p. 64, endeavours to show that this is not a proper construction of the statute of Eliz., but he admits that the current of authority is against him (see also Lewin on Trusts, 114, 115, Princ. Eq. 87).

XII. *Curtsey*.—Where a wife dies seised of lands in fee simple or fee tail, the surviving husband will be entitled to the property for his life, if there have been issue of the marriage. This estate is denominated an *estate by the curtesy of England*. There are four requisites necessary to make such a tenancy, namely, marriage, seisin of the wife, issue, and death of the wife (Co. Litt. 29 a; 2 Will. Saund. 45, note (5), 46, n. (9), 382 a, b; 3 Bos. and Pull. 652, note; 2 Simmons, 249; 2 Black. Com. 126; 1 Steph. Com. 246; 1st edit.; p. 251—254, 2nd edit.; Litt. s. 35, and note. The husband is entitled to curtesy of an equitable seisin of his wife. The seisins in equity on which curtesy attaches are threefold, namely, 1, trust estates; 2, equities of redemption in fee; 3, money to be invested in lands (see Watts v. Ball, 1 P. Will. 108; Casborne v. Scarfe, 1 Atkyns, 603; Cunningham v. Moody, 1 Ves. 174). By a marriage settlement, the wife's freehold estates were vested in a trustee, in trust for her separate use during her life, remainder for such persons as she should appoint by deed or will, and, in default of appointment, in trust for her right heirs. The wife died without having made any appointment, leaving her husband and a son surviving. After her death, the trustee sold the estate under a power in the settlement, which directed the proceeds to be invested in the purchase of other lands, or on mortgage, or in the funds, and the securities to be held on the trusts aforesaid: it was held that, on the wife's death, the husband became equitable tenant by the curtesy of the estates, and, therefore, was entitled to the interest of the purchase-money during his life. Although the right of the husband as tenant by the curtesy of an equitable estate of the wife may, perhaps, be excluded by a possession of the estate strictly adverse to the husband and wife, and to all other parties interested under the settlement during the whole period of coverture, yet the possession of the estate, in conformity with the equitable interest of the *cestuis que trust*, for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy. If the coverture begins after an adverse possession has commenced, and terminates during the continuance of such adverse possession, or if both the trustees and *cestuis que trust* are disseised before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, the husband would not acquire any title as tenant by the curtesy.

XIII. *Will, execution of*.—The formalities to the due execution of a will (except the wills of soldiers and mariners on service relating to personalty) are,

1, that the will be in writing; 2, that it be signed at the foot or end thereof (or, under the 15 & 16 Vic. c. 24, at least at, or after, or following, or under, or beside, or opposite to the end of the will, so that it be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will) by the testator, or by some other person in his presence and by his direction; and such signature must be made or acknowledged (2 Law Stud. Mag. N. S. 299), by the testator, in the presence of two or more witnesses *present at the same time*; and such witnesses must attest and subscribe (and not formally acknowledge a previous signature, 13 Jur. 712), the will in the presence of the testator (and it is prudent that they should do so in each other's presence), but no form of attestation is necessary, though it is usual for probate purposes to have one stating that all the requisites of the statute have been complied with (1 Steph. Com. 553, 554, 1st edit.; p. 569, 2nd edit.; 1 Law Chron. 376, 424; 27 Law Mag. 806—809). By sec. 15 of 7 Will. 4, and 1 Vic. c. 26, "if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate other than and except charges and directions for the payment of any debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or the husband or wife of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such attesting witness may be admitted to prove the execution of such will (1 Steph. Com. 554, 1st edit.; p. 570, 2nd edit.; Shelford's New Will Act, 38; see *re Mitchell*, 2 Curteis, 916).

XIV. *Leases for life and for term determinable on life*.—A lease for the life of the lessee passes a freehold interest, whilst a lease for 99 years, if he shall so long live, passes a chattel interest only (Burton's Comp. pl. 847, 848).

XV. *Lease of lands in mortgage*.—When a person has contracted for a lease, and the premises are in mortgage, both the mortgagor and the mortgagee should join in the demise. The mortgagee should "demise, lease, and to farm let," and the mortgagor, "grant, demise, lease, ratify, and confirm, and the rent should be reserved to the mortgagee, so long as the premises shall remain in mortgage, and to the mortgagor for the residue of the term, if any. The whole legal estate being in the mortgagee, he should therefore be the leasing party, and his mere assent to the mortgagor's granting leases of the mortgaged premises is wholly inoperative for transferring any interest to the lessee. A lease made by a mortgagor

(without the mortgagor, and before foreclosure, although he be in possession under the mortgage) is not good in equity, unless it be of necessity, and to avoid an apparent loss (Powell on Mort. by Coventry, 177, note; 9 Mod. Rep. 1; 2 Scho. and Lefr. 100).

EQUITY (*ante*, p. 299).

I. *Origin of equitable jurisdiction*.—The generally received opinion is that the equitable jurisdiction took its origin from the chancellors, who were the proper officers to whom all applications were made for writs to ground actions at the common law, having been *induced*, from many cases being brought before them in which the law afforded no remedy, to extend a discretionary remedy, so that the equitable jurisdiction was principally called into, being to remedy defects in the common law proceedings. The notion that uses and trusts gave rise to the jurisdiction is generally discarded, though no doubt they gave extended operation to the equitable jurisdiction. It is a very common opinion that the equitable jurisdiction was "borrowed" from that exercised by the prætors in ancient Rome (see 3 Black. Com. 50, *et seq.*; 1 Woodd. Vin. Lect. i. vi.; 1 Story's Eq. Jurispr. ch. 2).

II. *Subpœna*.—The writ of subpœna was by some said to be at variance with the first principles of the common law, because it required a defendant to become, as it were, his own accuser by discovering what he knew about the matters in contest. The writ is said to have been invented by John Waltham, Bishop of Salisbury, who was Keeper of the Rolls, above the 5th of Rich. II.; it was abolished by the 15 & 16 Vic. c. 86, s. 2.

III. *Equity more name than reality*.—Equity as administered in the courts of Chancery does not mean what some writers term natural justice, in which a decision *pro re nata* is to be given according to the peculiar circumstances of such case, and according to good conscience, but it is that portion of remedial justice which is exclusively administered by courts of equity, according to the established rules and precedents of other similar cases which have been decided before (3 Black. Com. 432, *et seq.*; Parke's Hist. of Chanc. 501, 506).

IV. *Exclusive jurisdiction of equity*.—Some of the cases in which equity interposes a relief when at common law no remedy is to be had are the following:—Discovery, cancellation and delivery up of documents, relief against accidents and frauds, specific performance of agreements (*ante*, p. xlv; vol. 1, pp. 317, 318), and other duties, bills to quiet possession, &c., to perpetuate testimony, injunctions to stay actions at law, enforcement of trusts, performance, &c., of marriage settlements, redemption of mortgages, and arrangement of the accounts, the

ascertainment and settlement of the rights of legatees, &c., under wills, administration of estates of deceased persons as well intestate as testate, charity suits, relief from penalties and forfeitures, not being merely for non-payment of mortgage money or rent, care and protection of idiots, &c. (1 Law Chron. 259; Smith's Manual, 6, *et seq.*)

V. *Agreement not binding.*—Some of the cases in which an agreement is not binding in equity, are the following: where the party was a lunatic, intoxicated or an infant; or the parties stood in the position of ward and guardian, solicitor and client, &c.; or the consideration is grossly inadequate; or there has been misrepresentation, fraud, &c. (Prin. Eq. ch. 20; 12 Law Journ. N. S. ch. 487; Key Exam. Answers, div. "Equity," pp. 45, 46)

VI. *Femes covert, favoured in equity—How to sue.*—Married women are favoured in courts of equity, by being allowed to have a separate estate in property so given to them, and in being allowed an equity to a settlement out of choses in action (1 Law Chron. 9, 87, 200, 272, 372, 459). A married woman may sue in equity, but she must have a next friend, whose written authority must be obtained (15 & 16 Vic. c. 86, s. 10; Key Exam. Ans. div. "Equity," pp. 50, 75, 76, 105).

VII. *Choses in action of surviving married woman.*—Where a married woman survives her husband her choses in action not reduced into possession by him survive to her, and she is entitled to receive same (Burden v. Jackson, 1 Russ. 1; Elwyn v. Williams, 18 Sim. 309; Key Exam. Ans. div. Convey, pp. 95—97; div. Equity, p. 75).

VIII. *Contracts of married women, enforcing.*—In general a married woman cannot be compelled to specifically perform her agreements, nor, of course, can she compel a performance, for the remedies must be mutual. However, as to her *separate estate*, she is treated as a feme sole, and her contracts respecting same (except so far as alienation restrained) will be enforced as against such property. It should seem, too, that where a married woman carried on business as a feme sole, she may be made liable out of her earnings for her contracts; but the whole doctrine as to the contracts of a married woman is in an unsettled state (see *per* Sir J. Leach, in Aguilar v. Aguilar, 5 Madd. 418; Aylett v. Ashton, 1 Myl. and Cr. 112; Murray v. Barlee, 3 Myl. and Ke. 226; 2 Jarm. Convey. 117, n. (c) by Sweet; Whitworth's Eq. Preced. 62, n (a), and 345, note; Princ. Eq. 189; Story's Eq. Jurispr. ss. 751, note, 787; Gaston v. Frankum, 13 Jur. 739).

IX. *Contracts of infant, enforcing.*—An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual, as the court could not compel him to execute it specifically.

It is a clear rule of courts of equity, that where there is no mutuality in the contract, specific performance cannot be decreed (1 Madd. Rep. 12; Flight v. Bolland, 4 Russ. 298; Princ. Eq. 187; Hargrave v. Hargrave, 14 Jur. 212). Generally an infant is not bound by any agreement, though it was formerly considered that he would be bound by a contract for his benefit; and as we have just seen, no specific performance can be had. But settlements or articles on the marriage of infants, under certain circumstances, bind them. Thus, a settlement of the *personal* property in *possession* of a *female* infant made on her marriage, was always binding, as being, in truth, the settlement of the husband, who would otherwise be entitled to the property on the marriage (Harvey v. Ashley, 3 Atk. 607; Key, div. "Conveyancing," pp. 104, 105; Ainslie v. Medlicott, 9 Ves. 13; Simson v. Jones, 2 Russ. and Myl. 365; Batten's Spec. Perf. 1—5). And by the 18 & 19 Vic. c. 43, infants (males at twenty, and females at seventeen) may make valid contracts for settlements of their real and personal estate upon marriage (*ante*, p. 62). A court of equity will take care that whilst it throws a protection over the infant, the latter shall not himself effect a fraud (see Watts v. Creswell, 9 Vin. Abr. Tit. "Enfant," n. pl. 24, 415; Strikeman v. Dawson, 11 Jur. 214; 1 De Gex and Sm. 90). And though an infant cannot be compelled to complete a contract for the purchase of an estate, yet if on such contract he pay a deposit, he cannot, in the absence of fraud in the vendor, recover it back merely because he declines to complete the contract (see Macpherson on Infants, cc. 36, 37. And see as to misrepresentation of age, Wright v. Snowe, 2 De Gex and Sm. 321).

X. *Lunatics, protection of.*—Courts of equity protect both the persons and property of lunatics by appointing guardians or committees, who are under the direct control of such courts, and are bound to act for the benefit of the lunatic. The lunacy is established on a commission issued by the Lord Chancellor, which is executed before a commissioner in lunacy and a jury summoned for that purpose. To obtain a commission a petition is presented to the Chancellor, stating the party's incapacity, and praying a commission, accompanied by affidavits evincing the lunacy of the party (2 Madd. Chanc. Fr. 728, *et seq.*).

XI. *Construction of deeds and wills.*—The rules for the construction of deeds and wills in courts of equity do not differ from those at common law, though formerly some distinction appears to have had existence (see *per* Lord Eldon, Underhill v. Horwood, 10 Ves. 228; 1 Sim. and Str. 217, note; 1 Spence, 520, *et seq.*). And generally speaking,

the rules for the construction of deeds and of wills are the same; the difference is confined principally to the words of gift or limitation (*Wigram's Extrin. Evid.* 75, 3rd edit.; 1 *Spence*, 522, 523). It is a rule that in a deed the first of two inconsistent clauses has effect, whilst in a will the contrary is the case, the last disposition of the testator prevailing over the previous inconsistent one (*Jickling*, 16, n.; *Broom's Max.* pp. 446, 447, 2nd edit.; 1 *Jarm. Wills*, 411, 1st edit.; *Foley v. Parry*, 2 *Myl. and Ke.* 138; 12 *Jur.* 181).

XII. Administration-suit, steps in.—An administration is now ordinarily obtained by summons and order at chambers (1 *Chron.* 54, 262, 408), or by a claim, which is set down and heard in court; it may, however, be obtained under Sir George Turner's Act, or by a bill, with or without interrogatories, answer and evidence on which a decree is obtained. This order or decree is not final, but merely directs the takings of accounts, of assets, debts, &c., and inquiries as to next of kins, &c., and that (if proper) any monies admitted to be in the hands of the personal representative be brought into court, or a separate application is made on the coming in of the answer. After the decree or order for administration is obtained, a copy should be left with the judge's clerk, and a summons obtained from him to proceed with the accounts and inquiries, upon the return of which summons, the clerk is to be satisfied that all proper parties have been served with notice of the decree or order, and then he proceeds to give directions as to the manner in which each of the acts and inquiries is to be presented, the evidence to be adduced in support thereof, the parties who are to attend, and the times for proceedings. The executors account is then brought in and the clerk proceeds to take same, and make proper allowances, and to disallow improper items. After this is done and the other inquiries after creditors next of kin, &c. are made, and certificates made and allowed, the cause is brought on upon further directions, and it is ordered (if possible) that the accounts be continued, further interest computed by the clerk, the further costs taxed by the master, and that the fund be divided among the parties entitled to it, and after the certificate of the clerk is obtained, showing how much each party is entitled to, a cheque for the amount is given to the Accountant-General, which after being countersigned by the Master of Reports or the Registrar (see *ante*), is paid at the Bank of England. If the party does not attend personally a power of attorney will be necessary, except in the case of very small amounts.

XIII. Duties of chief clerks of judges in administration suit.—The chief clerk of the judge after giving such directions as mentioned in the previous

answer as to the accounts and inquiries, approves of the advertisement for creditors and other claimants to come in, fixing the time and directing in what papers the same shall appear; on the day fixed, the clerk disposes of the claims or adjourns same for further evidence or for the purpose of seeing the judge thereon, or for discussion in court, if there be any difficulty requiring a discussion. Interest is subsequently computed on the debts proved and on the legacies, if any. The clerk also allows the creditors proper sums for proofs, or refers same to the taxing master. The claims of next-of-kin (if necessary) are also inquired into. Subsequently, the clerk gives a certificate of the result of his inquiries, and after four days from his own signature obtains that of the judge thereto, unless in the meantime the parties except to the certificate. The certificate is, with the accounts, transmitted by the clerk to the report office to be there filed.

XIV. Taxing master, duties of.—The taxing master's services are required before, or as consequent on, a final decree in an administration-suit, to ascertain the amount of costs to be allowed to a creditor who has established his debt in chambers (where it is thought proper to have a taxation), and also the costs of the parties to the suit, whether as between solicitor and client or as between party and party. A fair copy of the costs is left at the Taxing Master's offices, with a copy of any decree, order, or direction for taxation, and the proper master's name is then certified. A warrant to tax is then taken out and served, and the opposite parties being furnished with copies of the bills of costs, the master is attended and the proper amounts allowed. A certificate of the amount allowed is then obtained, filed, and office copy obtained (see as to taking Accounts, *King v. Savery*, 2 *Jur. N. S.* 431).

XV. Mode of taking evidence.—The old method universally adopted of taking evidence in equity by interrogatories is abolished, except that the court may order any particular witness or witnesses to be so examined. In the absence of such direction the evidence is taken either by affidavits or by oral examination before examiners (15 & 16 *Vic. c.* 86, ss. 28, 29). Since this act, the orders of the 13th of January, 1855, have directed that when issue is joined the plaintiffs and defendants respectively shall be at liberty to verify their respective cases, either wholly or partially, by affidavits, or wholly or partially by the oral examination of witnesses (see 1 *Law Chron.* 337, 338).

BANKRUPTCY (*ante*, p. 390).

I. Difference between insolvency and bankruptcy.—The chief points of difference between the bankrupt and insolvent debtors' laws are, independent of the

procedure, that the bankruptcy laws are for traders, whilst the insolvency laws are for non-traders, primarily, though traders also may petition for relief; the main distinction between the two systems is that by the bankruptcy, the trader's person, and his future property, are discharged from his debts incurred previous to the bankruptcy, whilst the insolvency protects, indeed, the party's person, but leaves his future acquired property liable, though only through the medium of the judgment entered upon a warrant of attorney always given by him prior to his discharge (see *First Book*, 265; *Whatford v. Moore*, 12 Jur. 47; *Key Exam. Answ. div. "Bankruptcy,"* pp. 1, 2).

II. *Bankruptcy courts*.—The courts exercising jurisdiction in bankruptcy are the commissioners' courts (each of which forms a Court of Bankruptcy) both in town and country, the Court of Appeal in Chancery, and the House of Lords.

III. *Definition of trader—Extent of trading*.—A general description of a trader, within the meaning of the Bankrupt Act, is "a person seeking his living by buying and selling," or "using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail." The principle which determines whether a person is a trader within the meaning of the bankrupt acts, in respect of the extent of his trading, is his intention or not to deal generally, and not the extent or quantity of his dealings. For though, in general, one single act of buying and selling will not make a man such a trader, without proof of his intention to continue such a course of dealing, yet trading in a very small degree will sustain a fiat, if there is an intention to deal generally (2 Black. Com. 476; exp. *Lavender*, 4 Desc. and Ch. 484; exp. *Moule*, 14 Ves. 602; *Doe v. Lawrence*, 2 Car. and Pay. 135).

IV. *Trading in England*.—The trading must be one that is carried on either within, or at least to or from, the realm (2 Steph. Com. 195, 1st edit.; Campb. 398; 5 Term Rep. 530). In one case (exp. *Smith*, Cowper, 402; see *Henley's Bankr. Law*, 6, 3rd edit.; *Allen v. Cannon*, 4 Barn. and Ald. 418), the bankrupt was never resident in England, and had never traded in but had traded to England, and had come on purpose to get a commission taken out against him; yet Lord Hardwicke held him to be a trader.

V. *Acts of bankruptcy per se and from intent*.—Acts of bankruptcy *per se* are lying in prison twenty-one days, escaping from prison, petitioning insolvent's debtors' court, assigning in trust for all creditors, non-payment, &c., of debt, or judgment, &c., after notice acts of bankruptcy depending upon the intent to defeat or delay creditors, are departing

the realm or dwelling-house, procuring or suffering an arrest, outlawry or execution of person or goods, and making any fraudulent grant or assignment of lands or goods (see *Key Exam. Answ., div. Bankr.* pp. 23—26; 1 Law Chron. 6, 7, 18, 189—199, 223—229, 251—258, 262, 334, 440).

VI. *Compulsory act of bankruptcy*.—A trader may, unless he pays his creditors, be compelled to commit an act of bankruptcy by any creditor (including a judgment creditor), giving notice requiring payment, and afterwards summoning the debtor; if the trader does not on the 8th day after service, pay, receive, or compound for the debt, or depose to a good defence, and give such security as may be directed, he will be deemed to have committed an act of bankruptcy (1 Law Chron. 225, *et. seq.*; *Key Exam. Answ. div. "Bankruptcy,"* pp. 25, 26).

VII. *Petitioning creditor's debt, nature of*.—The petitioning creditor's debt must be to the amount of £50, and must be a legal one, that is, recoverable at law; either at the time of petitioning or on the debt becoming actually payable (see 1 Law Chron. 284). The debt of a creditor seeking to prove may have been contracted after the debtor ceased to trade, whereas a debt of a petitioning creditor contracted after the trading ceased will not support a fiat (*Meggott v. Mills*, 1 Ld. Raym. 286; 1 Swanst. 64). The debt of the petitioning creditor must have been contracted (though it need not be payable) before the act of bankruptcy, but a creditor may prove his debt, if *bond fide* contracted before the filing of the petition, notwithstanding a prior act of bankruptcy (see 12 & 13 Vic. c. 106 s. 165; *Robinson v. Vale*, 2 Barn. and Cres. 762; 3 Barn. and Ald. 13; 1 Bing. 180). And then an equitable debt will not support a fiat, yet a creditor may prove for an equitable demand (*Walcot v. Hall*, 2 Bro. Chan. Cas. 306; *Rex v. Eggington*, 1 Term Rep. 369; *Mont. and Ayr. Bankr. Pract.* p. 163, 1st edit).

VIII. *Judgment creditor, priority*.—Judgment creditors, where judgment not a year old, have no priority (see 1 Law Chron. pp. 334, 335; 1 & 2 Vic. c. 110, ss. 13, 133, 184).

IX. *Petitioning creditor, married woman*.—On a debt due to a single woman, but not payable till after her marriage, the husband alone may petition (1 Law Chron. 286).

X. *Property not passing by assignees' appointment*.—In general by the mere appointment of assignees all the bankrupt's property and rights pass to them, but not what belongs to the bankrupt in the capacity of trustee for others (*Parnham v. Hurst*, 8 Mee. and Wels. 748; *Thorpe v. Goodall*, 17 Ves. 270), any office which he holds of such a nature that it cannot be legally sold (exp. *Butler*, 1 Atk. 210; *Hammond's Eq. Dig.* pp. 83, 171), his right of nomina-

tion to any vacant ecclesiastical benefice (1 Burn's Eccl. Law, 125), his military pay under the Crown, and his military pension under the East India Company (Hammond's Eq. Dig. p. 88; Gibson v. East India Co. 5 Bing. N. C. 262), none of which are at all affected by the bankruptcy. There are also some other exceptions to the general rule of all the bankrupt's estate passing to the assignees by the appointment; as in the instance of estates tail and copyholds, the transfer of which is specially provided for (3 & 4 Will. 4, c. 74, s. 55-65; 2 Law Stud. Mag. N. S. p. 100; 1 Steph. Com. 246); and also of leases held by the bankrupt, which it is at the election of the assignees either to accept or renounce (see 1 Law Chron. 76; 2 *Id.* 260-265).

XI. Proof—Annuity.—Any annuity creditor of a bankrupt, by whatever assurance the same may be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity (12 & 13 Vic. c. 106, s. 175; 1 Mont. and Ayr. Bank. Pract. 187). Annuitants prove for the value to be ascertained, *i. e.*, fixed, by the commissioner (regulated by the opinion of an actuary), regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission (12 & 13 Vic. c. 106, s. 175; exp. Whitehead, 1 Merivale, 122; 19 Ves. 557; exp. Thistlewood, 1 Rose, 290; exp. Webb, 2 Gl. and Jam. 30; exp. Saxe, 2 Deac. and Chit. 172; S. C. Mont. and Bli. 134; exp. Fisher, 2 Gl. and Jam. 102).

XII. Landlord—Distress.—A landlord may even after petition distrain for one years rent; before petition he may levy six years arrears (Briggs v. Lowry, 8 Mees. and W. 729; exp. Bailey, 20 Law Tim. Rep. 267).

XIII. Arrangements.—A trader may have his affairs arranged without being adjudicated a bankrupt, either by petitioning the Court of Bankruptcy for protection from arrest (12 & 13 Vic. c. 106, ss. 211), or by his entering into a deed of arrangement with his creditors (*Id.* s. 224). In the case of a petition for protection from arrest, the petitioning trader must have assets to the extent of £200. On the presentation of the petition duly verified, without obtaining the concurrence of the creditors, the commissioner will grant the trader protection, and order his release if in custody except in certain specified cases. The trader afterwards makes a proposal, which must be assented to by three-fifths in number and value of the creditors who have proved to the amount of £10 (12 & 13 Vic. c. 106, s. 213, 215). When the resolution or agreement has been carried

into effect, the court is to give a petitioning debtor a certificate thereof; and such certificate is to operate as a certificate of conformity, except only that any debt which shall have been contracted wholly or in part by reason of any manner of fraud, or breach of trust, or without reasonable probability at time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue-laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy, shall not be barred by such certificate. Where the second course above mentioned is pursued, namely, an arrangement by deed, the consent of six-sevenths in number and value of the creditors to the amount of £10 must be obtained (12 & 13 Vic. c. 106, ss. 224, 225; 1 Law Stud. Mag., N. S., 257-262; 1 Law Chron. 77, 120, 224, 315, 383, 442).

XIV. Proof—Contingent debts.—By 12 & 13 Vic. c. 106, s. 177, debts payable upon a contingency may be proved by the creditor applying to the commissioner to set a value upon such debt, and the commissioner is thereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided that such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.

XV. Reputed ownership—Consigned goods mixed with bankrupt's own stock.—Consigned goods so mixed with the goods of the trader as not to be distinguishable from the general mass of his own property, will, on an order for that purpose being obtained, pass to his assignees (1 Mont. and Ayr. 596). It seems difficult to conceive such a case, but if it should ever happen, it would almost seem that it must be under such circumstances as would entitle the assignees to the goods as being property of the bankrupt, *i. e.*, so confused, by the leave of the former owner, and not by the mere unauthorised act of the bankrupt, as to become a part of his own property.

CRIMINAL LAW (*ante*, p. 390).

I. Superior criminal court.—The Court of Queen's Bench is the only one of the superior courts at Westminster, which has criminal jurisdiction. This jurisdiction extends not only over all capital offences, but also over all other misdemeanors of a public

nature, tending either to a breach of the peace or the oppression of the subject (Com. Dig. tit. "Courts" B.; 4 Black. Com. 265, 312).

II. *Removal of indictment*.—An indictment may be removed at any time before trial by writ of *certiorari* from an inferior court of criminal jurisdiction into the court of Queen's Bench. By 5 & 6 Will. 4, c. 38, s. 1, no *certiorari* is to issue to remove any indictment or presentment into the Queen's Bench from any court of sessions, assize, oyer and terminer, and gaol delivery, or any court, at the instance of the prosecutor, or any other person (except the attorney-general) without motion first made to the Court of Queen's Bench, or before some judge of the court, and leave first obtained, in the same manner as where the application was made by the defendant (4 Steph. Com. 377; Dickins. Sess. 844, 4th edit.).

III. *Burglary and evidence*.—Breaking into another's dwelling-house, with intent to commit a felony, constitutes the crime of burglary. On the trial of an indictment for burglary the prosecutor must prove—1. The breaking. 2. The entering (if the indictment be for breaking and entering). 3. That the house broken and entered was a mansion-house, i. e. either a dwelling-house, or some building between which and the dwelling there was a communication, either immediate or by means of a covered and inclosed passage leading from one to the other (7 & 8 Geo. 4, c. 29, s. 13). 4. That the breaking and entry, or breaking out, were in the night-time, i. e. between nine in the evening and six in the morning (1 Vict. c. 86, s. 4). 5. That the breaking and entry were with the intent to commit a felony, or the being in and committing a felony, and afterwards breaking out (Archb. Crim. Plead. and Evid. 297—311, 10th edit.; Roscoe's Evid. 302, *et. seq.* 2nd edit.).

IV. *Forgery—Death*.—Forgery is now in no case punishable with death, the 11 Geo. 4, and 1 Will. 4, c. 60, having repealed all the statutes making the offence of forgery capital. Forgery is now punishable by transportation for various periods of time, extending in some instances to the party's life, or with imprisonment, with or without fine (4 Stewart's Com. 291, *et. seq.*; 4 Steph. Com. 180, 181, 1st ed.; First Book, 323).

V. *Bankers, &c., misapplying property*.—By the 7 & 8 Geo. 4, c. 29, s. 49, if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money or the proceeds of such security, and he shall, contrary to the purpose so specified, convert to his own use or benefit such money, &c., every such offender shall be guilty of a misdemeanour, and be

liable to be transported for any term not exceeding fourteen years, nor less than seven, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award. The same section also provides for a similar punishment of the same parties where any chattel or valuable security, or any power of attorney for the sale or transfer of any stock, &c., shall be entrusted to any such person, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall contrary to the object or purpose for which such chattel, &c., shall have been entrusted to him, sell, negotiate, transfer, *pledge*, or in any manner convert to his own use or benefit such chattel, &c. (see Carr. Crim. Law, 327; Dick. Quart. Sess. 277, *et. seq.* 4th edit.; 4 Steph. Com. 209, 326, 2nd edit.; First Book, 376, 405, 406).

VI. *Compounding felony*.—Compounding a felony is a criminal offence for which an indictment lies. It is called a high misdemeanour, and the punishment is fine and imprisonment (Dick. Quart. Sess. 295, 4th edit.).

VII. *Conspiracy—Husband and wife*.—An indictment for conspiracy between husband and wife only cannot be supported, as they are but one in the eye of the law, and the offence of conspiracy cannot, from its nature, be committed by one alone (Hawk. Pl. C. 72, s. 8; Archb. Crim. Plead. and Evid. 17, 677, 10th edit.; Dick. Sess. 338, 5th edit.).

VIII. *Felony by feme covert*.—If a married woman commit a felony (not being treason or murder) by coercion or even in the company of her husband, she is not liable to punishment (Reg. v. Manning, 2 Car. and Kirw. 908; 4 Black. Com. 28; Archb. Crim. Plead. and Evid. 15—17, 8th edit.; Key, Exam. Answ. div. "Criminal Law," p. 18).

IX. *Infant*.—Infants under the age of seven are deemed incapable of committing felony; a felonious intention being assumed not to be a possibility under that age. Between seven and fourteen, an infant is *prima facie* to be deemed *doli incapax*; but if it appear to the court and jury that he could discriminate between right and wrong, the maxim "*malitia supplet aetatem*" obtains, and the prisoner may be condemned and punished, except, indeed, for a rape, which an infant under fourteen is presumed to be incapable of committing (Archb. Crim. Plead. and Evid. 11, 8th edit.; 4 Black. Com. 212). As the legal presumption is that a child between seven and fourteen has not a guilty knowledge, it is for the prosecutor to rebut such presumption, and it should be left to a jury to say whether at the time the felony was committed the child knew he was doing wrong (Dickinson's Quart. Sess. 524, 4th edit.).

X. *Affiliation order, evidence of mother*.—The oath of the mother of an illegitimate child is not of itself

sufficient to charge a person as the putative father, but she must be corroborated in some material particular (1 Archb. Just. Peace, 159; 2 Law Stud. Mag. 56, 161; 3 *Id.* 7; 5 *Id.* 83, 84; see 1 Law Stud. Mag. N. S. Abr. Magist. Cas. 2, 3).

XI. *Wounding with intent to maim, &c.*—The statute referred to is the 1 Vic. c. 85, by sec. 4 of which the shooting at any person, or drawing a trigger, or attempting to discharge loaded arms at any person, or stabbing, cutting or wounding any person, with intent to maim, disfigure, or disable any person, or to do him some grievous bodily harm, or to resist a lawful apprehension are all felonies punishable with transportation for life, or not less than fifteen years, or imprisonment for three years or less (Archb. Crim. Plead. and Evid. 447, 8th edit.).

XII. *Perjury, number of witnesses.*—In order to obtain a conviction for perjury two witnesses are necessary (4 Black. Com. 358; Archb. Crim. Plead. and Evid. 155, 568, 8th edit.). However, it will be sufficient that the perjury be directly proved by one witness, and corroborative evidence on some particular point be given by another (vide *R. v. Mayhew*, 6 Car. and P. 315; *R. v. Yates*, *ib.* 182; *R. v. Parker*, 1 Car. and M. 639; *Reg. v. Roberts*, 2 Car. and Kirw. 607); and where the alleged perjury consists in the defendant's having contradicted what he himself swore on a former occasion, the testimony of a single witness in support of the defendant's own original statement will support a conviction (*R. v. Harris*, 5 B. and Ald. 929; but see *contra*, *Reg. v. Wheatland*, 8 Car. and Pay. 298, *per* Gurney, B.).

XIII. *Perjury, effect of conviction.*—A conviction for perjury prevents a man from acting as a juror (if challenged), and so formerly it did from being a witness, but now by the 6 & 7 Vic. c. 85, a party convicted of perjury may be a witness, and the objection will only go to his *credit* (3 Steph. Com. 583; 4 *Id.* 294 n. (h), 298 n. (d)).

XIV. *Retaining Queen's Counsel.*—The Queen's counsel have a standing salary and cannot be employed in any case against the crown, without special licence, first obtained. But counsel who have merely patents of precedence receive no salaries and are not sworn, and, therefore, are at liberty to be retained in causes against the crown (Tidd's Pract. 42, 9th edit.; 3 Black. Com. 27, 28). The licence when applied for is never refused; but an expense of about £9 is incurred in obtaining it (3 Black. Com. 27, n. (3) by Mr. Christian).

XV. *Conviction for felony, forfeiture.*—In felony the offender forfeits (on conviction) all his chattel interests absolutely, and (on attainder) the subsequent (3 Bac. Abr. 738, 7th edit.) profits of all estates of freehold during life; and by attainder for

murder the offender forfeits (First Book, 441) after his death, all his lands and tenements in fee-simple (but not those in tail) which go to the crown, for a very short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's year, day, and waste. This year, day, and waste, are now usually compounded for, but otherwise (we are not speaking of murder only, see 4 Geo. 3, c. 145) they regularly belong to the crown; and, after their expiration, the land would naturally have descended to the heir (as in gavelkind tenure it still does) did not its feudal quality intercept such descent and give it by way of escheat to the lord.

ARTICLED CLERKS IN THE COUNTY COURTS.

Gentlemen,—While fully acknowledging the kind interest which you have for a number of years taken in articulated clerks, and the great service that you have rendered them by the very beneficial information and instruction imparted for their benefit through the medium of your valuable publication, I have still to ask your favourable aid and assistance in procuring for them the privilege of appearing as advocates in the county courts. The subject is not new to you, having been mooted in your pages a few years since, when you expressed your approbation of it in such terms as now leads me to think its renewal will not meet with your disapproval. I am, however, well aware that to accomplish the success of a movement of this kind, something more is required than your assistance alone, and that this success will not be ensured unless the whole of those interested in its attainment—the articulated clerks—contribute to it by their combined co-operation and support; with this end before me, I have thought your columns the best means of bringing the subject forward, in order by so doing, if possible, to arouse them to an immediate effort to obtain, what appears to me, this really useful and desirable boon. I will not occupy your space by pointing out the many advantages which would accrue to the articulated clerk from such a system, nor resort to any correlative observations to shew its practical use and importance to him, for these I consider are self-evident and need no comment of mine to make them more apparent, but would endeavour to carry out the object, I have in view, by calling upon all my fellow articulated clerks to come forward at once, and with a spontaneity of feeling that will, if properly directed, prove irresistible, unite their efforts and petition the legislature to grant them this boon. I cannot, myself, imagine much opposition to exist against it, and I do think that if we were to go

heartily to work we should soon achieve our desires. I would, of course, let the consent of the solicitor with whom the clerk is articulated be necessary to his appearance. There is a form of petition to the Houses of Lords and Commons on this same subject, adopted by the articulated clerks of Manchester, in the Law Students' Magazine for May, 1852, just suited to the circumstances, and I think the general use of it by all the articulated clerks in the Kingdom would effect the object intended. I fear it is too late to think of having a clause inserted in the Lord Chancellor's "County Courts Act Amendment Bill," now before the House of Lords?

STUDIOSUS.

P.S. Should the movement be generally acceptable I shall be very glad to co-operate with any of my fellow students in endeavouring to carry it out, and for this purpose, if necessary, perhaps you will kindly furnish my name and address.

ANSWERS TO MOOT POINTS.

No. 64.—*Limitation on Failure of Issue* (ante, p. 276).

In answer to "A Subscriber" (p. 276), I beg to refer him to the case of *Pells v. Brown* (Cro. Jac. 590), in which I think he will find his question answered. There a testator devised to his son C. and his heirs for ever, but if he died without issue living, then B. was to hold those lands to him and his heirs for ever; it was determined that C. took an estate in fee simple, and that the limitation over to B. was good by way of executory devise. This case was decided previous to the 1 Vic. c. 26 (see also *Hanbury v. Cockerell*, 1 Roll. Abr. 885; *Porter v. Bradley*, 3 T. R. 143; *Sheers v. Jeffery*, 7 T. Re. 589; *Hughes Prac. of Sales of Real Prop.* 2nd edit., vol. 1, p. 315).

A CONSTANT READER.

No. 69.—*Devise "my Possessions"* (ante xlii).

This is a case in which considerable doubt is involved. I cannot find a decision directly in point. Where a testator commenced his will as follows:—"As touching my worldly property, I give, devise, and dispose of the same in manner following;" and after various bequests and devises, concluded—"All the rest of my worldly goods, bonds, notes, book debts, and ready money, and everything else I die possessed of, I give to my son George;" it was held that under the words in italics, coupled with the introductory clause in the will, George took a fee in lands of the testator not specifically devised (*Wilce v. Wilce*, 7 Bingham, 664).

In the construction of wills the intention of the testator, and whether such intention has been carried

into effect, are the principal points considered by the court. In the case above cited it will be observed, that by the preamble of the will it was testator's intention to dispose of all his property, and that the words in italics were held sufficient to carry that intention into effect. I think the same arguments will apply to the case mooted; for it is very evident that A. B. contemplated disposing of all he had in the world, and I should contend that as he had previously bequeathed the whole of his personal estate, he intended the words *together with all other my possessions* to apply to his real estate, and that they would accordingly be held sufficient to pass it.

FRED. SMITH.

No. 69.—*Devise "my Possessions"* (ante, p. xlii).

I am of opinion that the testator's real estate passed to his wife absolutely. He gives the whole of his personal estate to her, adding, "together with all other my possessions." Though untechnical, the words are most comprehensive; and if the words "all my concerns" (Ca. Temp. Talb. 286), "all I am worth" (1 Bro. C. C. 437), "all my worldly substance" (Cowp. 306), "everything else I die possessed of" (*Wilce v. Wilce*, 7 Bing. 664; *Warner v. Warner*, 15 Jur. 141), have been held to pass real estate, I cannot entertain a doubt about the effect of the words in the above will. I can see no essential difference between them. Besides, the expression "all other my possessions" following the bequest of the whole of his personal estate, can only apply to his real property. I also think the concurrence of the heir in the conveyance unnecessary, but if he is willing without consideration to concur, of course it will be desirable to preclude the possibility of any question.

WILLIAM EMSLEY, Jun. (Leeds).

No. 69.—*Devise—"My Possessions"* (ante, p. xlii).

On a careful consideration of the construction to be put upon this devise, I think the intention of the testator to be clear—that the words "together with all other my possessions" should pass his entire interest to his wife. The following cases containing expressions very much resembling the present have been adjudged to pass the fee—viz., "all my concerns" (Ca. Temp. Talb. 286), "all I am worth" (1 Bro. C. C. 437), "all my worldly substance" (Cowp. 306), "everything else I die possessed of" (*Wilce v. Wilce*, 7 Bing. 664; *Davenport v. Colman*, 9 Mee. and Wel. 481).

The cases I have cited seem so exactly in point, that I am decidedly of opinion the objection taken is invalid, and cannot be insisted upon. Any of these expressions, or others of a similar import, coupled with introductory words expressing intention to pass

all worldly property, have been held to pass the fee. In the present case I think the intention to be quite clear, for what else can the words "together with all other my possessions" be construed to mean?

J. G. B. EDWIN.

No. 69.—*Devise*—"My Possessions" (*ante*, p. xlii.).

It is a rule of law that the heir shall not be disinherited, unless there be some adequate expressions in the will sufficiently powerful to accomplish the same, as the heir-at-law has a title and will have one till it can be shewn that it has been defeated. Here the testator gave and bequeathed "the whole of his personal estate together with all other his possessions" unto his wife—now, it appears to me, that the word "possessions" is governed by the rule of law, that general words shall be subject to the words naming particular effects which precede them so that it is a word *ejusdem generis*, and the rather so as the word "possession" has been held to refer more to personal than real estate (*Wilkinson v. Merryland*, 1 Eq. Abmt. 178, pl. 19), and as it is preceded by the word "bequeath," which also refers only to personal estate so that the heir's estate is not defeated. In *Doe dem., Haw v. Earles* (15 Mee. and W. 450), a case somewhat in point, a testator disposed of his estate as follows:—"All my household goods, live stock, furniture, plate, wearing apparel, and other effects, at this time in my possession, or that hereafter may become my property unto my wife. But if my wife after my decease marry, her second husband shall have no claim, that is, to sell or dispose of any part of the property, which is now, or may be hereafter in my possession." This is a much stronger case than the one mentioned in the moot point, inasmuch as not only the word possession, but also the words "effects and property" appeared, which words have been many times decided to pass real estate (*vide also Saunderson v. Dobson*, 16 Law J., N. S. Ex. 249). Certainly there has been a case where a devise "of the residue of what the testator should die possessed of, or in expectancy of what nature or kind soever" has been held to pass real estate (*Cook v. Farrand*, 7 Taunt. 122), but there the position of, and the foregoing and following words clearly intimate and support the idea that real estate was intended to pass. And, I am of opinion, that had the testator given his wife the estate in the following words, "I give and bequeath all my possessions, and the whole of my personal estate" she would have taken the real property in fee, as several words have been held to pass real estate when they have preceded certain words which they would not have done, had they been subsequent to them as "*property, goods and chattels*" (in *Doe d., Wall v. Langlands*, 14 East,

370), and "*estate, goods and chattels*," (in *Tunewell v. Perkins*, 2 Atk. 102).

I apprehend, therefore, that the wife does not take the real estate under the words, "together with all other my possessions."

A. H. MORTON (Louth).

No. 70.—*Variation of the Habendum from the Testamentum in a Deed* (*ante*, p. xlii.).

I am of opinion that the assignment executed in this case does not create a joint tenancy between the legatees, the invariable rule at law being that when lands are conveyed to two or more persons, *without any modifying or disjunctive words*, they take as joint tenants (*Wat. Prin. Conv.* 158):

I cannot quite agree with the mooter of the question that the assignment was altogether unnecessary, because, although a testator bequeaths his personal estate either specifically or as part of the residue, yet the legal interest in the whole is vested in the executor by operation of law. However, in equity the executor takes the personal estate in the nature of a trustee in relation to such persons as have any claim on it. But nothing passes to the legatee, nor can a legatee take anything bequeathed to him without the executor's assent, either express or implied (*Byth. Conv.* vol. 2, 640).

But assent is only a perfecting act, for it is the will of the testator which gives the interest to the legatee, and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor, which shows his concurrence or agreement to the thing bequeathed, will amount to an assent (4 Bac. Abr. and Will. ed. 444, Legacies (L); *Noel v. Robinson*, 1 Vern. 94).

I cannot, however, see how the assignment can have any other effect than that of *confirming* the bequests of the testator. The *testatum* is perfectly consistent with the terms of the will, inasmuch as it states that "the said G., in accordance with the bequests in the said will contained," and the *habendum* gives to each legatee separately his own house, perhaps rather a verbose mode of limiting the property, but certainly importing nothing that could possibly be construed a joint estate.

For these reasons I think the effect of the assignment can only be treated as a mere assent to the legatees jointly on the part of the executor that the property being personalty, and therefore the primary fund for the payment of debts, is free from all liability in that respect.

J. G. B. EDWIN.

No. 70.—*Variation of the Habendum from the Testamentum in a deed* (*ante*, p. xlii.).

The whole of the testator's personal estate devolves upon his executor who is liable to creditors

for the satisfaction of their demands to the extent of the whole estate, and therefore, as a protection to the executor, it is necessary that the legatee of every gift of chattels, whether real or personal should obtain his consent before he can take a title to them. This assent may be either express, or implied from indirect expressions in particular acts. But this requirement of his assent does not empower the executor to change the estate of the legatees. he having but a mere right to confirm estates given by testator, therefore, in this case the deed is void as to the conferring of the estate, and the legatees take under the will severally, having different divided freeholds, yet under the principle that every deed shall be most strongly taken against the grantor, and the executors assent has been given thereby they cannot revoke it. Now supposing the executors to have had a right to vary the estate—the habendum would have been void, and they would have taken as joint tenants, for if a man lease twenty acres to two—habendum—ten acres to one, and ten acres to the other, the habendum is void; as it makes an express division of the acres which is inconsistent with the undivided possession limited by the premises, yet it is otherwise where a manor is leased to two, habendum one moiety to the one, and the other moiety to the other, as they are seized *pro indiviso* as tenants in common. I am, therefore, of opinion that the legatees take their estates severally, and not as joint tenants.

A. H. MORRIS (Louth).

No. 70. *Variation of the Habendum from the Testatum in a deed (ante. p. xlii).*

The proper office of the premises seems to be to name the grantor and grantee and the certainty of the thing granted; while that of the habendum is to limit the estate, which the grantee is to take in the thing granted: and this distinction seems to have a practical application, as the means of determining the estate to be taken by the grantee, or in cases of doubt as to the intention of the grantor. In Burton's Compendium it is laid down "that if there be two repugnant or contradictory limitations, that which is more for the advantage of the grantee shall prevail, but if they be reconcilable though dissimilar (as if the estate be given in the premises to the grantee and his heirs, but in the habendum to him and the heirs of his body), it seems that the habendum (whose office it is to limit the estate) will explain or control, what came before (see Burton's "Compendium," pp. 175 and 176).

Now in the present case there is no such repugnancy. The limitation in the premises is not expressly to the grantees as joint tenants, but merely in such general terms, as will raise a joint tenancy

by implication of law, and, therefore, quite susceptible of further explanation in the habendum. The analogy to the example given in the second proposition (above quoted from Burton, p. 176) seems complete, and I therefore think the legatees take in severalty.

A. L. TROTMAN.

No. 70.—*Variation of the Habendum from the Testatum in a Deed (ante, p. xlii).*

If in a deed there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected. Thus the legatees would take jointly, and must all join in a sale (Stephen, vol. 2, p. 474, and the case there cited).

J. S. B. (Hadleigh).

No. 70.—*Variation of the Habendum from the Testatum in a Deed (ante, p. xlii).*

I am of opinion, that each of the legatees takes an interest in the entirety of the messuages conveyed to them by the deed of assignment, and that the concurrence of all the legatees is necessary to sell any part of the property. In the case of Goodtitle v. Gibbs (5 B. and C. 709), Lord C. J. Abbott decided that if an habendum follow which is repugnant to the premises or contrary to the rules of law, and incapable of a construction consistent with either, the habendum shall be rejected, and the deed stand good on the premises.

W. MARSHALL.

No. 70.—*Habendum and Testatum varying (ante, p. xlii).*

In this case, I think the form of the deed of assignment is of little consequence, as the legatees would take their several houses under the will; and the assignment will be simply (and effectually likewise) of use, to shew the assent of the executor to the bequest, which is really the only material point in the matter. As to what is sufficient to constitute an assent (see Williams on Executors, Part 3, Book 3, ch. 4, sec. 3).

J. R. A. (Liverpool).

No. 70.—*Variation of the Habendum from the Testatum in a Deed (ante, p. xlii).*

The bequests in the will are sufficient to pass the respective messuages to each person named, without any assignment or confirmation by the executor, therefore, the assignment was unnecessary, and as the executor had no estate in him to assign, is void; the rights of the interested parties still rest under the will. But, assuming the assignment to have been necessary and effectual, the general rule as to the construction of deeds where the clauses are repugnant to each other, would apply, under which the testatum would prevail, although it might annihilate the habendum, except it could be brought

within the rule laid down in *Earl of Derby v. Taylor*, 1 East 503, and other cases bearing on the point, otherwise, the several interested parties take jointly, and consequently must be parties to a sale of the whole property.

J. G. H.

No. 71.—*Registered Judgments (ante, p. xlii).*

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J. G. H.

No. 71.—*Registered Judgments* (ante, p. xlii).

The act 18 Vic. c. 15, s. 1, answers this question. If any further authority is required, Lord St. Leonards in his (*Concise "Vendors and Purchasers,"* p. 396), says: "the act of 1 & 2 Vic. c. 110, applies in all its present provisions, to judgments in the counties palatine of Lancaster and Durham, and a separate register for each county is established by the act; but, neither the 2 Vic. c. 11, nor the 3 & 4 Vic. c. 82, applies to such judgments, they, therefore, do not require to be re-registered to bind purchasers, and the search should be for twenty years. The latter observation is now incorrect, the matter having been altered by the 3rd sec. of the 18 Vic. c. 15.

J. R. A. (Liverpool).

No. 72.—*Devise—Limitation over in default of Issue—Construction* (ante, p. xlii).

This is a simple question of construction. To what antecedent are the words "in default of issue" to be referred; and I think, that a single glance at the devise in question (without regard had to any rule of construction or analogous case) would find such antecedent in "*all and every the child or children of the body of E.*," and not in "*their heirs.*" The devise to the child or children *prima facie* carries the fee, and the subsequent words "*in default of issue*" refer to such children and not to their heirs. The case however of *Reu v. Marquis of Stafford* is strictly in point. Here the devise was to testator's daughter for life, remainder to granddaughter for life, remainder to trustees to preserve contingent remainders, remainder to the use of a power of appointment (which was decided to amount to a power in the granddaughter to appoint among her issue in fee, and which power was not exercised) remainder, in default of appointment, to the use of "*all and every the child or children of granddaughter and their heirs as tenants in common*" and in default of such issue, over. It is sufficient to say, that Lord Ellenborough expressly decided (in terms quite capable of embracing the present case) that the words "*in default of such issue*" must refer to the children of granddaughter, and not to their heirs, and that such children took an estate in fee; and a similar estate will be taken by the children of E. (the objects of the devise under consideration).

N. B.—No doubt, under certain circumstances the words "*in default of such issue*" appearing in a will dated before the late Will Act may import an indefinite failure of issue; e. g. suppose the devise to have

been to the children by name A. B. C. and D. and their heirs as tenants in common, and in default of such issue, over; here the word "*issue*" must refer to the heirs, if it has any meaning at all, and therefore import an indefinite failure of issue and A. B. C. and D. would be tenants in common in tail.

A. L. TROTMAN.

No. 72.—*Devise—Limitation over in Default of Issue Construction* (ante, p. xlii).

After much consideration and deliberation of this devise, I am clearly of opinion that the two children of E. take an estate in fee simple, and not in fee tail. The words relied on by Mr. Smith, "and in default of such issue," do not, in my opinion, curtail, but are merely used by the testator as indicative of what he means—that is, he first of all points out who the devisees are to be, and then limits the estate to those devisees in fee, and then he goes on to say, that if those devisees whom he has pointed out should fail, then the estate should go to some one else.

This is the only view that can be taken of the case at all consistent with the rule of law, that a smaller estate cannot be limited on a larger estate to the same person, a rule which, if the query mooted by Mr. Smith were correct, would be entirely subverted.

J. G. B. EDWIN.

No. 72.—*Devise—Default of Issue* (ante, p. xlii).

I think, that in the case put, the children of E. would take an estate in fee-simple (see *Doe dem Crew v. Lucraft*, 8 Bingham, 391); which was an action of ejectment, the plaintiff claiming as heir-at-law of the daughter of a testator, whose will ran thus: "should I depart this life without leaving issue, then I give and devise the said hereditaments to N. L.," and the defendant claiming under that devise. The testator's daughter died under age. Lord C. J. Tindal, in delivering judgment, said: I can only give the words their natural effect, that the estate is only to go over if the testator should die without leaving issue, and as that has not happened our judgment must be for the plaintiff.

J. R. A. (Liverpool).

No. 73.—*Landlord and Tenant—Notice to Tenant to quit part of Premises Demised* (ante, p. xlii).

The notice given by A. to B. to quit one of the six allotments is I think bad. It would, I think, be otherwise if in the demise, each allotment had been specifically named as well as the rent of each.

S. R.

No. 73.—*Landlord and Tenant—Notice to Quit* (ante, p. xlii).

A notice to quit a part only of premises leased together is bad (vide *Woodfall's Landlord and Tenant*, 3rd edit., p. 247).

J. R. A. (Liverpool).

No. 73.—*Landlord and Tenant—Notice to Tenant to quit part of Premises demise* (ante, p. xlii.).

The notice is invalid (Doe v. Archer, 14 East, 245; Doe v. Church, 3 Camb. 71). J. J.

No. 74.—*Married Woman—Acknowledgments* (ante, p. xlii.).

As the legal estate is in the first mortgagee, I do not think it will be necessary for a second acknowledgment to be made by Elizabeth. S. R.

No. 74.—*Married Woman—Acknowledgments* (ante, p. xlii.).

The transfer in question seems not to be a transfer properly so called, but a transfer in the nature of a new mortgage, in which Elizabeth joins as a necessary party. Such a transfer, even supposing no further advance had been made, would have required her acknowledgment. But the fact of that advance being made in the present instance, is, I think, conclusive; as the mortgagor of course charges the equity of redemption with the payment of the further sum and interest in addition to that already due; and thus divests herself of an interest in the mortgaged premises within the meaning of the statute. I think, therefore, that an acknowledgment is indispensable.

A. L. TROTMAN.

No. 74.—*Married Woman—Acknowledgment* (ante, p. xlii.).

If Elizabeth does nothing more than merely consent to and concur in the transfer, I think another acknowledgment will not be necessary. Ordinarily, in transfer of mortgages the mortgagor is made to grant, convey, and confirm, and if Elizabeth joins in this way, I conceive she must acknowledge, otherwise her grant and conveyance will have no effect (see sec. 77 of 3 & 4 Wm. 4, c. 74, and the interpretation clause of that act).

J. R. A. (Liverpool).

No. 74.—*Married Woman—Acknowledgments* (ante, p. xlii.).

I infer, of course, that Elizabeth was married on or before the 1st of January, 1834, and that the question relates to her dower, and that the property is not her own, therefore if the first mortgage was in fee, the second mortgage with further advances would not require her being a party thereto, because her legal interest was gone by virtue of the first deed and dower did not attach to equities of redemption (Dixon v. Laville, 1 B. C. C. 325), except where the mortgage was for a term, yet even in the latter case E. would gain nothing in the event of her recovering beyond the costs of the action, because execution would be stayed during the term (Maundrell v. Maundrell, 10 Ves. 246). If the property be E.'s own, the second mortgage should be acknowledged by her.

J. J.

No. 78.—*Contingent Remainders* (ante, p. xliii.).

There seems to be some misprint in this question. If at the death of A., children of C. were in existence, the remainders would have vested on their birth, and would on A.'s death come into possession. If on the contrary, A. died before C. has any issue born or in ventre ad mere the remainder being still contingent fails, and the estate will revert to the grantor.

Perhaps, however, the question will be corrected in your next. J. R. A. (Liverpool).

No. 78.—*Contingent Remainders* (ante, p. xliii.).

As the statute 7 & 8 Vic. c. 106, s. 8, does not provide for the case of the death of the particular tenant, the issue of C. are barred, and the estate reverts to the grantor.

FRED. SMITH.

No. 79.—*Will—Lunatic—Ademption* (ante, p. xliii.).

Apart from the question of ademption, it would be too precipitate to adopt the course suggested by the mooter of this question. To pronounce the impossibility of A. never recovering his senses, or that a return of lucid intervals may never happen, is, I think, to say the least, going too far, and exceeding the bounds of human possibility, as well as stamping the medical advisers with an infallibility which would not be just to attach to them, for if, providentially, A.'s reason should at any time return, it would be perfectly competent for him to revoke the present will altogether, and make a fresh one different in every respect. In that case the property would not then belong to the present parties at all. How then can they constitute themselves the owners of that which does not belong to them? It must be remembered that the will can only speak from A.'s death, and I am at a loss to comprehend how any portion of his property can in any manner be dealt with until that event actually happens.

J. G. B. EDWIN.

No. 80.—*Tenancy—Smoky Chimnies* (ante, p. xliii.).

If A. will not remedy the nuisance after being applied to, I think B. can give up his tenancy, and he will not be liable for rent for the period between the time of the commencement of the nuisance and his quitting (see Woodfall's Landlord and Tenant, also Cowie v. Goodwin, 9 Car. and Pay. 378; Collins v. Barrows, 1 Mood. and Rob. 112).

S. R.

No. 81.—*Service of Notice to Quit* (ante, p. xlii.).

I think the service of the notice to quit the Orchard, on Z.'s wife in the Turnpike Road, is not sufficient service, but it would have been so if, when she received the notice, she had been in her husband's dwelling-house, or in the Orchard.

S. R.

No. 81.—*Service of Notice to Quit (ante, p. xlii).*

I am of opinion that service of notice on Z.'s wife on the turnpike road is bad, but it may be served upon his wife or servant at his dwelling-house, explaining to them at the same time the nature of the notice, and it will be presumed that it came to Z.'s hands (see Archbold on the Law of Landlord and Tenant, p. 96).

SCRIBA.

No. 81.—*Service of Notice to Quit (ante, p. xliv).*

I am of opinion that the service in this case was not sufficient. The law with regard to the service of such notices appears to be that personal service is not necessary, but that they must be served either at the dwelling-house of the tenant, or upon the premises demised. If therefore the notice had been served upon the wife at her dwelling house it would have been sufficient, in support of which I beg to refer the mooter to the case of *Jones d. Griffiths v. Marsh* (4 D. and E. 464), where it was held that the delivery of a notice to quit to a servant (to whom the nature of it was explained) at the dwelling house though not on the demised premises was held sufficient to raise the presumption that the notice was delivered to the tenant.

FRED. SMITH.

No. 81.—*Service of Notice to Quit (ante, p. xliv).*

The service I take it would be insufficient on the Turnpike Road, it should be served upon the wife either in Z.'s dwelling-house, or on the demised premises (*Doedem Blair v. Street*, 2 Ad. and El. 329).

J. J.

No. 82.—*Tenant in Tail after Possibility, &c. (ante, p. xliv).*

When motives of public policy began to demand the free circulation of landed property, and the un riveting of the fetters which the feudal aristocracy had drawn around their estates, the courts of law took the popular side, and as a first step allowed the tenant in tail to bar his own issue. The recognition of this power (without reference to public policy), seems to have been justified by, and to have had its origin in the extreme probability, that issue would be born (upon which event tenant in tail seems from a very early period to have been allowed to aliene); and the extent of the principle to the barring ulterior estates was (it is apprehended) founded upon and had relation to that probability, and the consequent improbability of the remainders ever taking effect. Now, if we apply this to the present case, it is obvious that tenant in tail cannot bar his inheritable issue, for such issue can never exist; and the pedestal upon which the power of tenant in tail to bar ulterior estates is supported, thus giving way, the power itself (upon principle) falls to the ground.

A. L. TROTMAN.

No. 82.—*Tenant in tail after possibility &c. (ante, p. xliv).*

His estate in point of quantity is an estate for life, only owing to the following four qualities annexed to his estate, and, consequently, not within the statute *de donis*. 1. If he made a feoffment in fee, it would be a forfeiture, because having no longer a descendible estate in him he could not transfer it to another without prejudice to the person in remainder. 2. If an estate tail, or in fee, descended upon him, the estate tail after possibility of issue extinct, was merged. 3. If he was impleaded and made default, the person in reversion should be received as upon default of any other tenant for life. 4. An exchange between this tenant and bare tenant for life was good, for with respect to their duration they were equal (*Lewis Rowles's Case*, 11 Rep. Preston on Conveyancing, vol. 3, p. 222). J. J.

No. 82.—*Tenant in Tail after possibility, &c. (ante, p. xliv).*

The reason for a tenant in tail after possibility of issue extinct being considered merely as tenant for life, and that he is not allowed to bar ulterior estates, is, that it is quite clear that at his death the remainderman or reversioner must take his estate, the law therefore considering that he has virtually a mere life estate, denies to him the power of converting it into a fee simple (see *Letters on Conveyancing*, vol. 4, L. S. Mag. 496).

FRED SMITH.

COUNSELS PRIVATE OPINIONS IN FAVOUR OF ACCUSED PERSONS.—The newspapers are getting up a lively discussion upon the above subject in connexion with Mr. Shee's speech on Palmer's trial, it being asserted that the advocate attempted to obtain a verdict of acquittal by introducing his own opinion as to Palmer's innocence. It is certain that Lord Campbell thought proper to warn the jury against giving any efficacy to this statement.

TESTAMENTARY JURISDICTION BILL.—This bill has been abandoned for the present session, as the Government find it impossible to push it through, in the face of so much opposition.

INSURANCE OFFICES.—The papers continue to supply instances of the unsoundness of many of the insurance companies, and it becomes every one, especially professional persons, to be very cautious with what offices they have any dealings. We believe the unsoundness is not confined to the very recent ones only.

JUSTICES OF THE PEACE—QUALIFICATIONS.—This bill has been most unexpectedly thrown out in the Commons, so that the interesting question of solicitors acting as justices stands over.

The Law Chronicle.

No. 14—Vol. II.

JULY 2, 1855.

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MOOT POINTS.

No. 1.—*Dower—Conveyance to Uses.*

A. conveyed hereditaments to B., *to such uses, and for such estates and interests, intents and purposes, as the said B., by any deed or deeds, or by his last will, should direct or appoint, and in default of such direction or appointment, to the use of the said B. his heirs and assigns for ever.* Would B.'s wife be entitled to dower out of hereditaments so conveyed to B.? I always understood that the law considers a deed by which property is conveyed to a person to such uses as he should appoint and the deed by which he exercises that power of appointment as all one act, that the deed exercising this power of appointment only completes or carries out the power given him by the 1st deed; and, therefore, no judgment dower or other incumbrance can affect the property conveyed to a person to such uses as he shall appoint, inasmuch as he has not finished the act by carrying out the power. If this is not too late for your next number you will oblige me by inserting it, that I may be more clear on this point.

A SUBSCRIBER.

No. 2.—*Infant, &c.*

Would four months after an infant became of age be a reasonable time for him to avoid a lease entered into during his minority?

H. WOOD (Yeovil).

No. 3.—*Pawning Stolen Goods—Pawnbroker's Refusal to Deliver up Pledge.*

A. is indicted and found guilty of stealing certain articles belonging to B., which she had pledged for an advance of money. The rightful owner now requires the pawnbroker to deliver up the goods so pledged, but refuses to repay the amount due upon them. Is the pawnbroker compelled, without repayment, to restore such articles? and if so, under what statute is the remedy to be enforced?

J. H. MILLINGTON.

No. 4.—*Trustee and Executor—Acting in One Character and Renouncing the Other.*

A. by will devised all his real estate to B. upon trust for sale, and to divide the proceeds amongst his children. The testator also appointed B. his executor. Can B., having discharged the duties which devolved upon him as executor, disclaim the trusts with reference to the real estate, or is he compelled, having accepted an office, to perform the duties imposed upon him in both capacities as trustee and executor. The mooter would be glad to have the opinion of some of your able correspondents, as it appears a point upon which the authorities are somewhat conflicting.

J. H. MILLINGTON.

No. 5.—*Trustees under Will—Residuary Legatees.*

In the year 1881 R. S. made his will, whereby he gave to his wife a large legacy, one-half of which was to be at her own disposal, and the other half he specifically bequeathed to several legatees, and he appointed three executors, who proved the will. After bequeathing several legacies to be paid a year after his death, he gave all his residue of real estate to be converted into money, and all his personal estate, including the half of the specific legacy as before mentioned, unto several persons therein named. Application has been made by the legatees to the trustees to declare how much the residue is, as some of the legatees have a notion of selling their reversionary share, while others wish to mortgage their reversion, but the trustees refuse to give any account, and will not furnish this information; neither will they say how much was realised by the sale of the testator's real estate, nor will they tell where the money is invested. Is there any method of getting at this information from the trustees before the old lady (R. L.'s widow) "departs in peace?" It is a hardship to the legatees, some of whom are elderly, that they should be refused this requisite information. What is the easiest and most summary way of calling the trustees to account? They say they are not bound to give the necessary information.

GULIELMUS T. (Hexham).

No. 6.—*Agreement Stamp.*

In an action brought in the county court by some pitmen, for work and labour done in a colliery, against the owner, the following agreement was produced to shew the terms:—"To C. and Co.—I agree with you to let the stone drift at A. Colliery to work at £4 15s. per fathom, £1 per fathom to be kept back until eight fathoms be worked and then all the money to be paid up.—T. R."

When this illiterate and ill-penned memorandum was produced it was objected to its being received on account of its being unstamped, as the subject-matter showed that it was above £20 value. The answer to this objection was it required no stamp, as it came within the third exemption in the Stamp Act of 55 Geo. 3, c. 184, which is as follows: "Memorandum or agreement for the hire of any labourer, artificer &c." It was argued that the plaintiff's (pitmen) were labourers within the exemption, and no stamp was necessary. His honour, however, did not think the exemption applied, and non-suited the plaintiffs. Was the judge right in so doing? Are there any authorities bearing on this question, if so please to refer me to them, as I apprehend that the judge's decision was incorrect?

GULIELMUS T. (Hexham).

No. 104.—*Obstructing Lights by Building*
(vol. 1, p. xlii).

A right to the enjoyment of light and air may commence by mere occupancy. Every man on his own land has a right to all the light and air which will come to him, and he may erect even on the extremity of his land buildings with as many windows as he pleases without any consent from the owner of the adjoining lands. After he has erected his building the owner of the adjoining land may, within twenty years, build upon his own land, and so obstruct the light, which would otherwise pass to the building of his neighbour. I think, therefore, that A. cannot sue B., and that the case is not affected by the statute.

K. Y. Z.

No. 104.—*Obstructing Lights by Building* (vol. 1, p. xlii).

B., in the absence of a grant, and before the period has elapsed which suffices for the establishment of a prescriptive claim, is competent to construct a wall or house on the adjoining land as near to his house as to intercept the light which it would otherwise have received, for B.'s right to erect edifices on any part of his own soil as that of the first builder. I conceive that the mooter intended to refer to 2 & 3 Wm. 4, c. 71, which only appears to abridge the time within which a prescriptive right may be claimed (*Blanchard v. Bridges*, 4 Adol. and El. 195).

J. H. MILLINGTON.

No. 104.—*Obstructing Lights by Building*
(vol. 1, p. xlii).

This case is governed by the Prescription Act (2 & 3 Wm. 4, c. 71), and A. is unable to bring an action against B. for obstructing the light, as A. has not enjoyed the right twenty years. Shelford says (at 76): "A right to the enjoyment of light and air may commence by mere occupancy. Every man on his own land has a right to all the light and air which will come to him, and he may erect even on the extremity of his land buildings with as many windows as he pleases without any consent from the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour." The above observations apply to the case of the mooter, wherein he will see that A., not having a title by prescription, is without a remedy against B.

GULIELMUS T. (Hexham)

No. 105.—*Evidence—Affiliation of Bastard*
(vol. 1, p. xlii).

By the 14 & 15 Vic. c. 99, ss. 2, 3, the putative father is a competent witness, and may be compelled to give evidence for the mother, but not to answer

any question tending to criminate him. Whenever a person is charged before justices with any offence punishable on summary conviction, either by fine, penalty, or imprisonment, the defendant will not be either competent or compellable to give evidence. But in applications for orders in bastardy, and in all other cases in which an order, as distinguished from a conviction, is made by justices, each party will not only be a competent witness, but, if required by the other, be compellable to give evidence on his behalf, and may be summoned as a witness in like manner as any other person (*Stone's Justices Pocket Manual*, 5th edit. p. 106). A defendant need not answer any question which may tend to criminate him, but if he does answer, which may supply the corroborative evidence required by the complainant, the justices would be warranted in making an order upon the defendant, and, if he disobeyed the order of the justices, he would be liable to be imprisoned for any term not exceeding three months in the common gaol. I don't suppose that the questions of having paid complainant money, or promised her marriage, would be considered as tending to criminate defendant, but it might, and undoubtedly would, be considered by the justices as corroborative testimony. My opinion is, if defendant refuse to answer, and the justices refuse to commit him for contempt, the only remedy complainant has would be by mandamus.

GULIELMUS T. (Hexham).

No. 106.—*Sale by Auction—Set-off against Price of Goods* (vol. 1, p. xliii).

In this case I think the auctioneer may recover the full amount of the purchases, and may entirely disregard the set-off. The case of *Williams v. Millington* (1 H. Blackstone, 81) is a very similar case to the present. There the plaintiff was an auctioneer, and was employed by one Crown to sell his goods by auction. The sale was at the house of Crown, and the goods were known to be his property. Defendant bought goods to the amount of £7 9s. 6d., and after packing them in a cart which he had ready, paid the plaintiff £2 4s. 6d. in cash, and put a receipt into his hand for £5 5s. as for a debt due from Crown to the defendant. While plaintiff was hesitating whether to take the receipt in payment defendant drove off the cart with the goods. Afterwards plaintiff paid over to Crown (who refused to accept the receipt) the whole sum for which the goods were sold, and brought an action to recover the five guineas in lieu of which the receipt was offered, and the plaintiff obtained a verdict; and on a rule being obtained to set aside the verdict, it was held the auctioneer had a right of possession, coupled with an interest and a special property, and was entitled to retain his verdict.

W. ENGLAND BARKER.

No. 106.—*Sale by Auction—Set-off against Price of Goods* (vol. 1, p. xliii).

An auctioneer is considered an agent for each party, the vendor and vendee, and the property of the goods belongs to the auctioneer. There does not exist any doubt in my mind as regards the auctioneer's right of action against J. W. for the full amount; the ownership is by the sale completely changed, and the property is in the auctioneer, who can recover the full price notwithstanding any set-off J. W. may have against his employer; and it would be no answer to the auctioneer's action that W. H. owed him (the defendant) £6. On referring to Selwyn's *Nisi Prius*, 2nd edit. p. 190, there is a case identical to the present, which bears out my opinion, it is *Williams v. Millington* (1 H. Bl. 81). The facts of the case are briefly these: the plaintiff, an auctioneer, was employed by J. S. to sell his goods; the defendant was present, and bought articles to the value of £7 9s. 6d.; he paid plaintiff £2 4s. 6d., and gave him a receipt for five guineas due to him from J. S. J. S. having refused the receipt and the balance, the auctioneer brought an action against the defendant for the five guineas, and obtained a verdict.

GULIELMUS T. (Hexham).

No. 106.—*Sale by Auction—Set-off &c.*
(vol. 1, p. xliii).

This is a branch of the law of agency, and governed by the maxim *qui facit per alium, facit per se*, and in almost every case where an agent, having proper authority, makes a contract for his principal, that contract is binding on the principal, and the third party has the same rights against the agent for any of his rights or privileges as if the principal had personally entered into the contract; and, therefore, if an action be brought in the name of any agent, instead of the principal, the third party is entitled to make the same defence, set-off and establish the same claims against the agent as if the action had been brought in the name of the principal. And, therefore, I am of opinion that the auctioneer cannot recover the £7 in full, but must take the set-off of £6, and the tendered £1 (*Coppin v. Walker* 7 Taunt. Rep. 237; *Coppin v. Craig* 7 Taunt. 243; *Leeds v. Marine Insurance Company*, 6 Wheat. 565); and a tender to an agent will be a good tender to a principal (*Goodhand v. Blewett*, 1 Camp. Rep. 477); and even supposing the sale was not primarily valid on account of the conditions of sale not being complied with, yet, as the auctioneer has brought an action against the defendant, thereby acknowledging his title to the goods, he has estopped himself from all rights he may have had on that head.

A. H. MORTON (Louth).

NOTICES TO CORRESPONDENTS.

INDEX.—The Index to Vol. I. accompanies this number, and that volume may now be bound. The Index is a very complete one, and the subjects of Bankruptcy, Insolvency, Practice of Common Law, and of Equity, will be found chiefly comprised under those heads, which will be a great convenience to any one wanting to read those heads of the law. We are sorry that the Index has proved unexpectedly lengthy, which has necessitated the omission of much practical matter and also of some notices and communications to and from correspondents, which omission shall be remedied in the following number.

CAROLUS.—We are sorry we cannot in this number comply with your request. Next month we shall certainly be able.

A SUBSCRIBER.—It is impossible to say when the articles referred to will be completed, but they will be resumed with next number, and we believe more than a half of the quantity has already appeared.

T. S. G.—Write to the Secretary of the London Law Students' Debating Society at the Law Institution Chancery-lane, London.

L. A. S.—You will see by the Questions in this present number that they are by no means getting easier, and on the other hand they are in reality greatly increased in number, as many of the questions relate to several subjects, each of which might suffice for a question.

LIST OF CORRESPONDENTS.—The following gentlemen are willing to correspond and their names are to be added to the previous lists, viz., Mr. J. H. Millington, of No. 15, Earl-street, Red Lion-square, London; Mr. A. S. Trotman, West-end, Wellingborough, near Northampton. The revised list will be inserted in the number for August, and we shall be glad of additions or alterations, &c.

SUBSCRIPTIONS.

The subscription for Vol. I. (Nos. 1—13) is now £1 2s. and we shall be obliged by the amount being forthwith remitted. The subscription for the next volume (Nos. 14—25) will be £1, if pre-paid; if not pre-paid it will, as in the case of vol. I., be £1 2s. We should prefer pre-payment of subscriptions, and as it is an advantage to our subscribers we trust they will for the future adopt the pre-payment plan. Post Office Orders should be made payable at the STRAND Post Office, to our publisher, MR. THOMAS DAY, of No. 13, Carey Street.

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The Law Chronicle.

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AUGUST 1, 1855.

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DIVISION II. embraces the EQUITY Questions and Answers. The third edition, containing "The Principles of Equity," appeared in 1852, price 4s. 6d. The "Practice" part will appear before long.

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*. All the editions now on sale are unaffected by any recent alterations in the law.

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DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' SOCIETY,

4th July, 1855.

A. starts game on B.'s land, and follows it into and kills it on the land of C. Does A. acquire the property in the game?

At common law a distinction existed between the case of game started by a stranger in a park, chase, or warren, and killed in the grounds of another person, and that of game started in mere private grounds. In the former case the owner of the park, &c., having a less qualified property in animals *feræ naturæ* than the owner of mere private grounds, it was held that his property could not be changed by the act of a stranger (*Sutton v. Moody*, Lord Raym. 251). In the latter case the property in the game vested in the stranger (*Churchward v. Studdy*, 14 East, 259), though liable in trespass to both owners, the reason being, as stated by Blackstone, that it could not vest in the owner of the ground on which it was started, because the property is local, nor yet in the owner of the second, because it was not started in his soil (2 Blackst. 419).

By the Game Act, 1 & 2 Will. 4, c. 32, s. 36, it is enacted, "That when any person shall be found on any land in search or pursuit of game, and shall then and there have in his possession any game which shall appear to have been recently killed, it shall be lawful for any person having the right of killing the game upon such land, by virtue of any reservation or otherwise, or for the occupier of such land (whether there shall or shall not be any such right or reservation), or for any person acting by their orders, to demand from the person so found such game in his possession, and in case such person shall not immediately deliver up such game to seize and take the same from him for the use of the person entitled to the game upon such land."

Mr. Williams, in his work on Personal Property, p. 21, appears to consider this clause as vesting the property in game killed by a stranger in the person having the right to kill such game, but the more correct view would seem to be that, until such last-mentioned person has exercised his right of demanding it (which, it will be observed, is much restricted), the property in the game has been gained by and remains in the trespasser. The case was likened to that of goods in the order and disposition of a bankrupt within the 125th sec. of the Bankrupt Law Consolidation Act, which, unlike the bankrupt's own goods, do not vest in the assignees by virtue of their appointment, although they have, with the consent of the court, the power of seizing and selling the same for the benefit of the creditors.

It is quite clear that the Game Act does not affect the property in game started in privileged grounds, such as a park, chase, or warren, it being expressly provided by sec. 8 that the act shall not prejudice the rights of the owner of any such parks, &c.

The meeting decided that A. does acquire the property if the land is not a park, chase, or warren, and the game has not been demanded according to 1 & 2 Will. 4, c. 32, s. 36:

S. BALDEN, Jun., *pro Sec.*

MOOT POINTS.

No. 7.—*Tenant for Years—Right to Compensation.*

A., a tenant by curtesy, makes an absolute lease to B. for five years. B. enters, and is in possession some months, when A. dies. B. is served with notice to quit by the remainderman, which he does the following Michaelmas, knowing himself to be a trespasser as against the remainderman. Has B. any, and what right, to compensation from A.'s representatives? Will some of your correspondents refer me to authorities on this subject. A. B. C.

No. 8.—*County Court—Commitment—Execution against Goods.*

A. obtained a judgment in the county court against B., and the money not being paid, he issued a judgment summons, under which B. was committed to prison for thirty days. B. has effects, but A. did not issue any execution, preferring to issue a judgment summons. Query, could he now, after order of commitment obtained, seize upon B.'s effects to satisfy his judgment? THEMIS.

No. 9.—*Rabbits—Trespass in Pursuit of.*

A. is walking with two dogs along a highway, and is supposed to merely tell his dogs to go into a field adjoining it after some rabbits, but continues himself to walk on along the road. His dogs do not catch any. B., the owner of the property, wishes to proceed against A., but the mooter is fearful that B. can do nothing against him, as his dogs did not kill anything, but will be glad to hear from some gentlemen whether he can, and if so, for what (*vide Sir John Lade v. Shepperd*, 2 Str. 1004, which is the best case I can find, but in that the defendant *shot* off the highway, thereby rendering himself liable; see also 2 Inst. 705). Query—Would it have made any difference if his dogs had caught a rabbit and brought it to him; and also if A. had thrown a stone at a rabbit sitting in the road, and killed it, could he be proceeded against (*Goodtitle v. Alker and Elmes*, 1 Burr. 138). C. N. ALLDRETT.

No. 10.—*Contract for Sale—Receipt Stamp.*

A receipt is given for £30 as part of the purchase money of certain hereditaments, and signed by the vendor, which bears the receipt stamp only. Is such a receipt good as an agreement, and will a court of equity enforce a specific performance? W. H.

No. 11.—*Minerals—Reservation of, with Right of Working.*

A. is owner in fee of land and the minerals underneath, and leases part of his land for 999 years to B., on which B. builds houses. A. reserves the minerals, with liberty to get them, "without making any compensation" to B. for damage.

Query—1st. Is the "no compensation clause valid," and if A. sink in his land (the part not leased, and get coal underneath that leased to B., and B.'s houses fall, is A. liable? (*Hilton v. Earl Granville*, 5 Q. B. 701; *Humphreys v. Brogden*, 12 Q. B. 739). 2ndly. Can A. enter on B.'s lands to sink for coal, without having reserved an express power in B.'s lease. INQUIRER.

No. 12.—*Assault—Defendant.*

In a case of common assault, in which the complainant was the sole witness, the defendant was tendered to contradict his evidence. The magistrates refused to hear him; his advocate, however, held that under the statute allowing plaintiffs and defendants to be witnesses, they should have received the defendant's evidence in this case. Who was right? THEMIS.

ANSWERS TO MOOT POINTS.

No. 1.—*Dower—Appointment (ante, p. ii).*

The question whether dower would attach in case the lands were limited to such uses as the husband should appoint, and in default thereof to the use of him in fee, and then such power of appointment having been exercised, has been the subject of much controversy, but at length the negative has been established (*Ray v. Pring*, 5 Barn. and Ald. 561; 5 Maddock, 315; *Moreton v. Lees*, C. P. Lancaster, March Assizes, 1819, and Mr. Justice Heath's dictum, in *Cave v. Holford*, 3 Ves., 671). The purchaser, under a power of appointment, has, as the mooter supposed, his estate as if it were limited to him by the deed creating the power (*Sir Edward Cleere's Case*, 6 Rep. 176), and as though the use declared in his favour had been put in the place of the power. And it was decided after a long discussion in *Doe v. Martin*, 4 T. R. 39, that the estates limited in default of appointment were vested subject to be divested. Therefore, where lands are limited, as above stated, the husband is seized in fee until appointment, so

that until exercise of the power of appointment, and in default of such exercise, the wife becomes dowable (*Lord Eldon in Maundrell v. Maundrell*, 10 Ves. 253).

A. H. MORTON (Louth).

No. 1.—*Conveyance to Uses—Dower (ante, p. ii).*

The effect of a conveyance to the common dower uses is as follows: The grantee first takes the absolute power of conveying the estate, subject to this power, and to provide against its being wholly or in part unexercised, the estate itself is conveyed to him and his trustee in fee simple. In case of re-sale, under the power, the original deed and the appointment operate (as suggested by the mooter) as one deed only, to vest the estate in the appointee, and the appointor's widow is not entitled to dower, because her husband was never entitled to more than a power. Again, in default of appointment, the estate itself is conveyed, and were it an absolute conveyance the grantee's widow would be dowable. But the estate of the trustee intervenes, and this it is that prevents the grantee from becoming solely seised, and consequently bars his widow's right of dower. In the precise point offered by the mooter the estate was, subject to the appointment, conveyed to the grantee solely, so that his widow will be dowable. If, however the power had been exercised, the widow would, notwithstanding the non-intervention of a trustee, have been barred (*Ray v. Pring*, 5 Barn. and Ald. 561; 5 Mad. 310; 3 Martin, by Davidson, 206, in note. R. E. P.

No. 2.—*Infant—Lease (ante, p. xii).*

An infant must make his election whether or not to avoid a lease, within a reasonable time after the attainment of his majority. Four or three months of holding over, and even less, has been accounted such a length of time as would bar him from disagreeing to it (*Holmes v. Blogg*, 8 Taunt. 35).

A. H. MORTON (Louth).

No. 3.—*Pawning Stolen Goods—Pawnbrokers' Refusal to Deliver up Pledge (ante, p. xi).*

The statute 7 and 8 Geo. 4, c. 29, s. 57, enacts, that if any person stealing any goods shall be indicted and convicted by the owner, the owner shall have the goods restored to him either in specie or value; and in case of refusal the court may award writs of restitution, or order restitution in a summary manner. And this may be done without giving any recompence to the buyer or pawnee, for the law is, *spoliatus debet, ante omnia, restitui*; and though this be hard upon the buyer, yet Blackstone says,—“The law prefers the right of the owner who has done a meritorious act by pursuing a felon to condign punishment to the right of the buyer whose merit is only negative, that he has been guilty of no unfair transaction.”

A. H. MORTON (Louth):

No. 5.—*Trustees under Will—Residuary Legatees*
(*ante*, p. ii).

It is submitted that the trustees are liable to render an account to the residuary legatees, and that the proper mode is by bill in chancery (*vide* Maddock's Chancery Practice, vol. 1, p. 721).

R. E. P.

No. 101.—*Copyhold Grant—Feoffment*
(vol. 1, p. xiii).

My view of this mootpoint, I think, was erroneous in the last number; I now, therefore, correct it. My opinion is, that there was no feoffment as in such a conveyance livery of seisin is essential to to complete it, which is the delivery of the actual possession of the land or tenement by the feoffor to the feoffee—livery of seisin is of two kinds, livery in deed, and livery in law: the former being the actual delivery of the possession when the feoffor comes himself upon the land and taking the ring of the door of the principal messuage, or a turf, or a twig, delivers the same to the feoffee, with words to this effect:—"I deliver these to you in the name of seisin of all the land and tenements contained in this deed." Livery in law is where the same is not made on the land, but in sight of it only, the feoffor saying to the feoffee:—"I give you yonder land, enter and take possession." The feoffee must enter during the life of the feoffor, or it is not good livery (*Cruise*; 1 Steph. Com. p. 484). As I apprehend these ceremonies have not been complied with, the feoffment is not valid (*Alpha* says that the grant was accompanied by livery of seisin. I don't see how it possibly could). [Why not?—Eds.].

GULIELMUS T. (Hexham).

No. 106.—*Sale by Auction—Set-off against Price of Goods* (vol. 1, p. xliii., and *ante*, p. iii. and iv.).

The case of *Williams v. Millington* (1 H. Blackstone, 31), cited by Messrs. Barker and G. T., *ante*, pp. iii. and iv., is held only to have decided, that the auctioneer has such a right in certain cases as will entitle him to sue in his own name; but if it did go further and decide that a debt of defendant could not be set-off against principal's debt when goods were sold by auction and action brought by auctioneer, this was overruled by *Coppin v. Walker and Coppin v. Craig*, Taunton, 237; and, further, the defendant has the right to avail himself of those defences which would be good against the principal for whose use the action was brought *Smith v. Lyon*, 3 Campb. 465; *Welstead v. Levy*, 1 M. and Rob. 138; *Rex v. Hardwick*, 11 East. 578; and if principal's shopman or servant had privately sold goods, defendant would have been entitled to set-off his debt (1 Law Chron., 327), the auctioneer is also principal's servant only selling in a different manner,

and simply having but an interest in the goods for his claims, which interest, if he does not give notice of to the defendant at the time of sale, disappears, and the law clothes him with nothing further, therefore, I maintain, with all due deference to the gentlemen differing from me, that the giving the receipt for £6 and the £1 in cash, was a good and sufficient payment of the £7 by J. W.

A. H. MORTON (Louth).

Erratum in page 24.—In the first and second lines of the Answer of R. E. P. to Moot Point No. 100 expunge the words "assignees of a trade."

NOTICES TO CORRESPONDENTS.

VOLUME I. is now ready, and can be had half-bound in calf, and free by post for 23s.

G. B. W.—Your letter arrived too late for notice last month. An acknowledgment is necessary.

J. M. C.—You will be in time after the expiration of your articles.

LEX (Manchester).—A new edition of Taylor on Evidence has been lately published.

M. R.—We do not know of any other legal debating society in town for articulated clerks.

LIST OF CORRESPONDENTS

We unexpectedly find that there is not room in this number for the revised list, which shall, however, appear in next number.

The following is the only additional name to be added to the lists published before, viz., Mr. R. E. Pannett, of Whitby.

SUBSCRIPTIONS.

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The Law Chronicle.

No. 16—Vol. II.

SEPTEMBER 1, 1855.

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Richard Richards, Esq. (Master in Chancery).

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We trust we shall shortly have to report a large addition to the above names, as at present the number is very small, compared with the large body of articulated clerks in town and country.

A MAIDEN ASSIZE IN RADNOR.—At the assizes at Presteign, Lord Chief Justice Campbell commented the grand jury on their attendance, and declared the county a sort of Paradise. His Lordship claimed and received the usual token of a maiden assize—a pair of white kid gloves, which, he said, he should preserve with the blank calendar, as a pleasing memento. The gaol did not contain a single prisoner on a charge of felony.

PUBLIC AND PRIVATE BILLS.—274 petitions for private bills were deposited in the Private Bill-office last session, as appears from a return moved for by Mr. Brotherton, M.P. The number of public bills introduced during the session amounted to some 224, of which 28 were brought from the Lords.

MOOT POINTS.

No. 13.—*Building Society—Income Tax.*

A. purchases shares out of a building society, and, in accordance with the rules of the society, mortgages his property to the trustees upon trust for himself, his heirs, executors, administrators, and assigns, while he and they shall duly make the payments mentioned in and observe the several rules and regulations of the said society in respect of the shares so purchased. The payments referred to in the mortgage as being contained in the rules are those of subscriptions, interests, and fines. The clause as to interest in the rules runs thus:—"That every member who has purchased his or her building money shall pay a rent of 8s. 4d. per share every first Tuesday evening in the month, over and above all taxes, repairs, insurance, ground-rent, and other expenses." The shares are £100 each, and this rent of 8s. 4d. per share per month is equal to £5 per cent. per annum. The society has gone five years, and A. now claims against the society income tax upon those rents of 8s. 4d. per share per month paid by him on such purchased shares, and to deduct such income tax from his payments to the society.

Is A. justified in making such deductions, according to the rules of the society, and can the society, on A.'s deducting such income tax, and refusing to make the full payments mentioned in the rules, proceed to enforce fines as for non-payment? The rules of the society have, of course, been certified by J. Tidd Pratt.

T. E. JONES (Manchester).

No. 14.—*Railway Company—Trustees of Charity.*

A railway company agreed with the trustees of a charity to exchange a piece of land required for the purposes of their scheme; after the lapse of some years they found they had no power to make an exchange, and as five years had elapsed since obtaining their act, they were unauthorised to purchase the land. Query: Can the trustees eject the company from the land, or is it a dedication to the public.

S. H. (Harborough).

No. 15.—*Voluntary Conveyance.*

A voluntary grantee, being aware that the grantor was not able to pay his creditors, and being desirous to avoid the operation of the statute of Elizabeth, which makes voluntary conveyances void as against creditors, sold the property for valuable consideration, the purchaser being acquainted with the circumstances. Can the creditors of the voluntary grantor claim the property? Would the case be different if the purchaser had not had notice of the voluntary conveyance?

O. P. Q. (Cheltenham)

No. 16.—*Killing Hare.*

A hare is started on the lands of A., and, after running for some little time, is shot before the hounds on the turnpike road by A.'s gamekeeper.

Is there any, and what, remedy against the gamekeeper, knowing them to have trespassed on his master's land, and also if he was ignorant of the fact?

VENATOR.

ANSWERS TO MOOT POINTS.

No. 2.—*Infant, &c. (ante, p. ii.)*

The election to avoid a lease must be made by the infant within a reasonable time after he attains his full age, and it would seem that an acquiescence of four months after majority would preclude an infant from afterwards disaffirming a lease (Woodfall's Landlord and Tenant, 5th edit. p. 37).

E. R. JAKES (HANDSWORTH).

No. 7.—*Tenant for Years—Right to Compensation (ante, p. vi.)*

A. B. C., in his query, did not state whether the tenant was aware at the time of the lease being granted to him that the lessor was merely tenant by curtesy. If he was, he cannot have any remedy against, or claim compensation from, the lessor's representatives. If he was not aware of the fact, but was led by the lessor to believe that he was absolutely possessed, I opine that his representatives would be liable to an action, on the covenant for quiet enjoyment, at the suit of B. (vide Woodfall's Landlord and Tenant, 6th edit., pp. 508, 509, and the cases there cited).

R. W. (Cheltenham).

No. 8.—*County Courts—Commitment—Execution against Goods (ante, p. vi.)*

By the 103rd section of 9 & 10 Vic. c. 95, it is enacted that no imprisonment shall operate as a satisfaction of the debt, &c., or deprive the plaintiff of any right against the goods of the defendant.

S. H. (Harborough).

No. 8.—*County Court—Commitment—Execution against Goods (ante, p. vi.)*

By sec. 103 of the 9 & 10 Vic. c. 95, it is provided that imprisonment shall be no satisfaction of any debt recovered in the county court. The words of the act are: "That no imprisonment under this act shall in anywise operate as a satisfaction or extinguishment of the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being anew summoned and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this act, or deprive the plaintiff of any right to take out execution against the goods and chattels of the defendant, in the same

manner as if such imprisonment had not taken place." Before A. can seize upon B.'s effects I think it would be necessary for A. to summon B. afresh to enable him to seize.

GULIELMUS T. (Hexham).

No. 12.—*Assault—Defendant (ante, p. vii).*

In summary convictions, punishable by fine, penalty or imprisonment, the defendant will not be either competent or compellable to give evidence, and assaults, malicious injuries to property, &c., would be considered as offences in a criminal proceeding within the meaning of the statute. I am of opinion that the magistrates were correct in refusing to hear the defendant. Yet it is a daily occurrence by some justices to take the defendant's evidence in cases of assault.

GULIELMUS T. (Hexham).

No. 106.—*Sale by Auction—Set-off against price of Goods (vol. 1, p. xliii, ante, p. iii, iv, and viii).*

I still think the auctioneer can maintain the action, and disregard the set-off. The cases of *Coppin v. Walker* and *Coppin v. Craig* (7 Taunt. 237), cited by Mr. Morton, are, I think, decided on peculiar circumstances, which do not enter into the present question, and the plaintiff was in those cases considered to have by his own acts and course of conduct barred himself from saying that defendant had no right of set-off; and, indeed, *Williams v. Millington* (1 H. Blackstone, 81), cited by T. G. and myself (*ante*, p. viii), is expressly recognised as good law. Park, J., observes: "Nothing we decide in this case breaks in upon the authority of *Williams v. Millington*, which only decided that an auctioneer might maintain an action in his own name. The court thought as circumstances there occurred which do not occur in the case of a common agent" (and for this reason *Smith v. Lyon*, *Welstead v. Levy*, and *Rex v. Hardwick*, cited on the other side, are inapplicable) "the action might be maintained. Here the only question is whether the plaintiff has by his own act and declaration authorised the defendant to do that, which is a bar to his action." I submit, therefore, *Williams v. Millington* is the case bearing upon this point. W. ENGLAND BARKER (Huddersfield).

No. 10.—*Contract for Sale—Receipt Stamp (ante, p. vii).*

The vendor's receipt for the purchase money or deposit (if properly stamped as a receipt) operates as an agreement which would be enforced in equity in a suit for specific performance (*vide Evans v. Prothero*, 2 Mac. and G., cited in *Dart's Vendors and Purchasers*, 2nd edit. p. 110).

R. W. (Cheltenham).

NOTICES TO CORRESPONDENTS.

G. B. H.—Your question (which we have before us now) was very different from that put to counsel. May we notice the subject (upon which we have doubts) in our next?

A SUBSCRIBER.—Mr. Horsey's book sells for 10s. Mr. Shaw, of Fetter-lane, is the publisher, but it can be ordered through any bookseller. There is no one complete work on Criminal Law: the best are Russell on Crimes (very expensive), and Archbold's different works—such as Criminal Pleading and Evidence, and his Justice of the Peace.

L. S.—Your reading seems to have been extensive enough, but it is not always the quantity which secures success. You had better concentrate your energies on those portions which are likely to form the subjects of examination.

U. B.—You will not now be in time for Michaelmas Term. Get the agent to give your notices for Hilary Term.

. We have, in consequence of Vacation time, been unable to resume in this number the articles "Bankruptcy Law," "Solicitor's Library," &c., but we fully expect to be able to do so in the following number.

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MOOT POINTS

No. 17.—*Statute of Uses—Lease for Years.*

A lease of itself vests in the lessee no estate whatever in the demised premises; it merely gives him an *interesse termini*, a right to enter and take possession of them. So that to complete the title of the lessee he must actually enter upon the demised premises (vide "Archbold's Landlord and Tenant" 2nd. edit: p. 43). In Stephen's Comm. 3rd. edit., 1st. vol. p. 514, it is said: "A lease for years gives no complete estate until entry has been made; but if a man seised of land, bargain and sell it for a term of years, the use thus raised will be executed and become a complete estate for years, by force of the statute, without any additional ceremony; upon the same principle that a bargain and sale for a freehold interest will enure to pass a freehold, without livery of seisin." Mr. Hayes, in his "Introduction to Conveyancing", 5th. edit: 1st. vol. p. 122 says: "As to leasehold interests, (i. e. for a term of years, leaseholds for life being freehold interests), the statute of uses had no application to the transfer, though it had to the creation of chattel interests. When A., the legal owner of a freehold interest, conveyed the land to B., to the use of C. for a term of years, or made a bargain and sale of the use to C. for a term of years, the statute drew the term out of the freehold interest, and vested it in C. at law." In precedents of leases, the lessor is usually made to "grant, demise, and to farm let" unto the lessee, the words "to the use of" being omitted. It would certainly appear from the above authorities that if those words were included, the lessee would, at once, become possessed of the term, and consequently by virtue of such possession would, without entry, be entitled to many rights which, otherwise, would not attach until entry. Can any correspondent inform me why the words in question are not usually inserted?

O. P. Q. (Cheltenham).

No. 18.—*Innkeepers' Licence.*

Under 9 Geo. 4, c. 61, a person on the 4th September, 1855, applied to a bench of borough magistrates for a licence to sell exciseable liquors; but it appeared that the notices to the overseer and the constable were served on the 30th June, instead of "within the month of July" as directed by the act. The magistrates, therefore, refused to entertain the application.

Query.—Were the magistrates justified in refusing to entertain the application on the ground that the notices were served too soon?

S. W. (Yeovil.)

No. 19.—*Copyholds—Admission of Heir-at-Law of Mortgagee—Stamp Duty.*

In 1849, A. B. surrendered certain copyhold property to C. D., for securing £100, which surrender has never been discharged. The mortgagor and mortgagee are both dead, and the heir-at-law of the latter is about to take admission. This being an admittance *on death*, it is thought that the stamp duty will be £1; but as it is also an admittance *upon a mortgage* will not 2s. 6d. be sufficient? See 13 & 14 Vict. c. 97, schedule Tit. Copyhold.

ALPHA (Witham).

No. 20.—*Devise—Mortgage or Sale.*

Harriet Wilson, by her will, gave to her nephew, Ralph Harrison, a dwelling-house and three closes of land in case he should survive her and attain the age of twenty-six years, and in case of his death before attaining that age, without having lawful issue, then she devised the same to her cousin, Maria Philipson, her heirs and assigns for ever. Ralph has survived his aunt, and has reached the age of twenty-six years, but is unmarried; he wishes to mortgage or sell the property, but Maria insists that he can do neither, as he has only a contingent estate. The mooter contends that the devisee, Ralph can either mortgage or sell at his option, and might have done so at twenty-one, as the estate was vested in him. What kind of estate has Ralph, and can he dispose of it by sale or mortgage without requiring the consent of Maria Philipson?

GULIELMUS T. (Hexham).

No. 21.—*Legacy to Married Woman Payable out of Real Estate—Assignment—Acknowledgment of.*

We should like to have an opinion of any of our subscribers who may feel competent on the following matters, premising that it is said that the two are similar, and one point for consideration will be whether there is or not a distinction between the two statements, so as to require different answers:—

No. 1.—A testator, lately deceased, devised freehold property to A. B. and his heirs, subject to and charged with the payment (exclusive of the personal estate) of a pecuniary legacy to C. D., a married woman, and payable at the testator's death. C. D. and her husband have contracted with E. F. for the sale to him of the legacy. Qy. is it necessary that the assignment of the legacy should be acknowledged by C. D., under the Fine and Recovery Abolition Act?

No. 2.—A. B., by his will, gave real estate to C. D., his heirs and assigns, he paying thereout to testator's daughter, M. H., £200. Testator's daughter and her husband have sold their legacy to E. F., and the question arises whether, in order to

pass her legacy, the deed of assignment should be acknowledged under the Fine and Recovery Act? Having had grave doubts as to the necessity of an acknowledgment, I submitted the point to the consideration of counsel, who advised as follows:—"M. H.'s legacy having become vested in possession, and being now paid to her husband, he alone can receive and give a discharge for it, and her acknowledgment or execution of the deed seems to be unnecessary; it is desirable, however, that she should execute, in order to render it hereafter unnecessary to prove her marriage as part of the title."

[See the case of *Hobby v. Allen*, 15 Jur. 836, and the dissenting case of *Briggs v. Chamberlain*, 18 Jur. 56; 21 Law Tim. Rep. 218; and the more recent case of *Tuer v. Turner*, Week. Rep. 1854-5, p. 583; S. C. 25 Law Tim. Rep. 252; also stated *ante*, p. 87, with the authorities referred to in such cases.—ED.]

ANSWERS TO MOOT POINTS.

No. 15.—*Voluntary Conveyance.*

(*ante*, p. xi.)

I think that equity would interfere in favour of the claims of the creditors in this case. To render a purchaser from a voluntary grantee secure it is absolutely necessary that the purchase should be for a valuable consideration and *bonâ fide*; the second of these essential ingredients is wanting in this case, and subjects the property, therefore, in the hands of the second purchaser to the claims of the creditors of the original grantor. See Story's "Equity Jurisprudence," s. 434. J. F. C.

No. 15.—*Voluntary Conveyance (ante, p. xi.)*

As the purchaser was acquainted with the circumstances the creditors can claim the property. In *Huguenin v. Baseley* (14 Ves. 289) Lord Eldon says: "I should regret that any doubt should be entertained whether it is competent to a court of equity to take away from third persons the benefit which they have derived from the fraud (imposition) or undue influence of others. The case of *Bridgman v. Green* is an express authority, that it is within the reach of the Court of Chancery to declare the interest so gained by third persons cannot possibly be held by them." But had the purchaser been without notice, I think the creditors could not claim the property (see *Harrison v. Wiltshire*, 4 Law J. N. S. Chanc. 80, and the cases there cited).

J. T. B. (Hadleigh).

No. 15.—*Voluntary Conveyance, (ante, p. xi.)*

As the property has been sold for valuable consideration (and an adequate price paid for the same

I suppose) the conveyance will be protected, and the creditors of the voluntary grantor will be unable to claim the property, equity will not interfere and the conveyance will prevail. I do not think notice of the grantor's circumstances would have the effect of setting aside the conveyance (*Story*, 425, 433; 2 Spence, 288). GULIELMUS T. (Hexham).

No. 106.—*Sale by Auction—Set-off against Price of Goods* (vol. 1, p. xliii; *ante*, pp. iii, iv, viii and xii).

Perhaps I erred in my previous arguments in referring to *Coppin v. Walker* (7 Taunt. 237) as in exact point with this question, for there the auctioneer could not recover because defendant had settled with principal and set off his debt previous to the bringing of the action; but yet there may be gathered from it that that set-off may be had, though goods are sold by auction, for Dallas said that, "the defendant is induced probably by this representation to become a purchaser, that he may have the opportunity to set-off the price of the goods which he held payable by the principal to him." This I think is sufficiently expressive of defendant's legal right to set-off, and see the latter part of the opinion of Parke, J., who strongly supports him. But Mr. Barker's denial that the particular circumstances of this question are similar to *Coppin v. Craig* (7 Taunt.) is unfounded. In that case there had been no actual settlement, and defendant pleaded that the auctioneer was only trustee for the principal, and also a set-off due from the principal to him, and he was held entitled to his set-off. The present moot point is similar in almost every particular, therefore *Coppin v. Craig* governs it; and the case of *Jarvis v. Chapple* (2 Chitt. 387) is also in point. The auctioneer, Jarvis, brought an action—defendant pleaded as in *Coppin v. Craig*—counsel contended that the plaintiff as an auctioneer could bring an action and not be defeated by a set-off of a debt of the principal to the seller—Lord Ellenborough said, "If the auctioneer sold them as his own goods, or had a lien upon them, the set-off would not defeat his action. But after an intimation to him of the principal's debt and the conversation above, he must be subject to the set-off of the debt of the principal," &c.; vide also *Atkins v. Amber*, 3 Esp. 390. The case of *Williams v. Millington*, 1 H. Blk. 81, cited by Mr. Barker, is not in point. The facts of the case are as he has stated, and that the auctioneer gained a verdict. But though the auctioneer there obtained a verdict, yet the case was decided on other grounds, and the doctrine of set-off was not entered into; had it been so the defendant would have gained the verdict. The declaration was for goods sold and delivered, the plea the general issue, i.e., a total denial of ever having received any goods of the

auctioneer, or, in other words, denying that the auctioneer had a right to bring an action, and *he never pleaded his right to set-off*. Now, according to plaintiff's counsel, had defendant averred that the plaintiff was agent of the crown, then stated the debt and pleaded payment of the residue, he might have availed himself of the statutes of set-off, and he refers to *Winch v. Keely* (1 T. R. 619), and therefore that the only question in the case was, "whether the plaintiff could maintain an action for goods sold and delivered?" So that, according to counsel, *Williams v. Millington*, might be an authority to support my view of the case rather than the other. The judges refer not at all to the set-off; they decide that the auctioneer may maintain an action, and as *Parke, J.*, says, it ONLY decided as much. The marginal note to the case goes not beyond this, and *Messrs. Story, Paley, Bateman, Chitty, Phillips, Petersdorff*, and others refer to it as such.

Mr. Chitty supports my opinion when he says that "these (i.e., factors, auctioneers, &c.) may sue, unless the principal or real owner elect to bring the action in his own name, but the agent sues subject to any right of set-off against the principal." And again, at page 850, "although the agent may maintain the action in his own name, yet the demand is in general subject to any right of set-off which the defendant may have against the principal." *Messrs. Story, Paley, Phillips and Bateman* write to the same effect, and state the above cases. This doctrine, as I have before stated, is based upon the maxim *qui facit per alium facit per se*, and it is only an obvious dictate of natural justice that *qui sentit commodum sentire debet et onus*, and that he who has acquired through his agent certain fixed rights and remedies upon the contract against the other contracting party, shall be placed in a position of entire reciprocity with regard to him.

A. H. MORTON (Louth).

BANKRUPTCY OF MESSRS. MARE & Co.—The bankruptcy of these well-known ship builders has caused some sensation in the commercial world, and some interest attaches to it in a professional point of view, on account of the steps which have been taken by the creditors and the commissioner to carry on the business. At a meeting, held under the presidency of the official assignee and with the sanction of the commissioner, a committee of the creditors was appointed, to advise with the official assignee in his endeavours to carry on the works until the choice of creditors' assignees.

RAILWAY EXPENCES.—It now appears that a large portion of the £12,000,000 said to have been paid by the railways in parliamentary expences consisted of money paid to landowners and friends of the originators of the scheme.

NOTICES TO CORRESPONDENTS.

S. G.—You had better wait a little longer, as the delay will not affect your admission.

VOLUNTARY CONVEYANCE.—We have so many answers to this point that we have been compelled to destroy the greater number of them, and fear we have given insertion to too many.

SUBSCRIBER (Leeds).—The Keys are still on sale, and can be had either direct or through a bookseller.

L. T.—You can have your name inserted in the list if an articulated clerk or a solicitor.

G. B. H.—It was so late in the month when your last obliging note arrived that we had not time for this number to consider the matter, but have given insertion to the point.

A. X.—We cannot yet say what day the examination will be. It is quite true that the examiners are getting stricter.

M. O. R.—The first vol. of Davidson's new edition of *Conveyancing Precedents* is published, but we cannot say when the others will appear. The promise is a volume every four months, but the performance will be very different.

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HOLLOWAY'S PILLS effected another Cure of the Digestive Organs.—Mr. Andrew Dawson, of Melbourne, was a constant sufferer from indigestion; no matter what he ate, the difficulty of digesting it was always the same, for which he consulted many of the medical profession, and tried remedy after remedy without obtaining any benefit whatever; being nearly dispirited with continual suffering, he was advised to try Holloway's pills; he did so, and adhered to the diet recommended with the directions; thus he has so strengthened the tone of his stomach, and increased his appetite, that he can now indulge in any kind of animal or other food without the least inconvenience. Sold by all druggists, and at Professor Holloway's Establishments, 244, Strand, London; and 80, Maiden-lane, New York.

MOOT POINTS.

No. 22.—*Exercise of power of sale by trustees to preserve, &c., where estate limited in tail—Succession duty.*

A. by his will devises an estate to trustees and their heirs to the use of B. for life, remainder to the use of the trustees to preserve contingent remainders, remainder to the use of the heirs of the body of B. in tail male. A. gives to his trustees a power of sale and exchange with the consent of the tenant for life. The trustees, with the necessary consent, exercise the power of sale. Does the conveyance require enrolment as a disentailing deed? The will directs the purchase money to be invested in the purchase of land, to be held upon uses similar to those above. Will the estate sold be liable to succession duty in the hands of the purchaser upon the death of the tenant for life, or does such duty attach upon the purchase money or the property purchased with it?

No. 23.—*Judgment in Long Vacation on Writs specially indorsed.*

Previous to the passing of the Common Law Procedure Act, 15 & 16 Vic. c. 76, no declaration could be filed between the 10th of August and the 24th of October. Can judgment now be entered up and execution issued in an action under the 27th section of that act, between the dates above where the writ has been specially indorsed?

No. 24.—*Separate estate—Husband's concurrence.*

Copyhold property is settled upon trust to pay a life annuity to A., and then upon trust for B., a married woman, for her sole and separate use, independent, &c., following the usual words. The trustees have power to lease for twenty-one years, and have exercised it, the tenant has made an advantageous offer to take the property for twenty-one years more, but his solicitor requires the concurrence of the husband as well as of B. in the lease, and the husband cannot be found. Can B. alone give an effectual consent to the further lease?

QUERENS.

No. 25.—*Devise of Crops.*

A., by his will, gave to his eldest son B. all the crops which might be on his land at the time of his death; and to C., his other son, all the rest and residue of his personal estate. The will was duly executed in the month of July, the testator dying in the latter end of September, when nearly the whole of the crops growing on his land at the time of making his said will had been reaped and stacked. Is B. entitled to the crops so reaped (no mention being made in the will as to growing crops, but

merely all the crops on the farm), or is he only entitled to the crops growing on the land at the testator's death; and in case of B. taking possession of and selling the crops so reaped, what remedy will C., the other legatee (who is entitled to all the residue of his personal estate, which would include the said crops so reaped if the decision were in his favor), have against B.? The mooter is of opinion that B. is only entitled to the growing crops on the land at the testator's death, but will be obliged by some authorities on the subject.

G. H. CLOUGH (Workshop).

No. 26.—*Articled Clerks—Death of Master.*

A. was articled to B. and C. partners, professional men (not solicitors), carrying on business at D., to whom he paid a large premium, and they entered into the usual covenants to teach him their business. Soon after A.'s becoming their clerk, C., who was the only partner possessing any knowledge of the business, died, and A. is consequently deprived of the instruction he would have received from him had he lived. A. is still with B., the surviving partner, but he being wholly incapable of teaching him his profession, his remaining with him is of little service, and he is, therefore, anxious to place himself under another and more competent person. Since A. was articled to B. and C., does not the fact of C.'s death operate as a dissolution of the articles, and entitle A. to demand a return of a portion of the premium, and to have his indentures, of which there is still a considerable time to run, given up to him. If so, then he will have an opportunity of improving himself in his profession under another master, but if he is obliged to complete his term with B., at the end of it he will not be in a position, through a want of knowledge of his profession, to practise for himself, but he put to additional trouble and expense in making himself proficient in it.

H. L. BAKER.

No. 27.—*Mortgagee—Liability.*

A. executed a legal mortgage of certain leasehold premises to B. for securing £500 and interest, and afterwards executed a second mortgage of the same premises to C. for £200 and interest, B. having notice thereof; would he be liable to C. if he accepted, on tender by A., the amount of his mortgage money and interest, and handing over the title-deeds of such premises to him without first informing C. thereof? Otherwise A. would be in a position to act with the property as unincumbered, and so defraud the second mortgagee of his claim. If in the affirmative, must C. proceed by action at law or in equity?

E. R. JAKES (Handsworth).

No. 28.—*Power to Will—Exercised by Codicil.*

A., by his will, empowered B. to will and to give the sum of £100 in such manner as B. should think proper. B. exercised the power by a *codicil*. Was this a legal exercise of the power?

A. SUBSCRIBER.

ANSWERS TO MOOT POINTS.

No. 17.—*Statute of Uses—Leave for years*
(*ante*, p. xiv).

By the operation of the Statute of Uses, the fact of a good consideration (to which of course a reservation of rent would amount) being expressed, is alone capable of raising a use, and giving the instrument the effect of a bargain and sale (properly so called). Hence actual entry, and *à fortiori*, the insertion of the words *to the use of* are not necessary. The Question remains, why is that form of limitation always inserted in the conveyance of freeholds and not in leases? I should suggest, in answer, that the distinction is kept up in practice out of respect to the doctrine, that the Statute of Uses has a more limited application to personality than to freehold property.—Query: Whether the common law lease and the interest called "*interesse termini*" have any existence now?

A. L. J.

No. 18.—*Innkeeper's License* (*ante*, p. xiv.)

According to the 9 Geo. 4, c. 61, s. 10, it seems clear to me that the magistrates were perfectly justified in refusing to entertain the application for license to sell exciseable liquors on the grounds stated, inasmuch that it appears imperative on the magistrates to be ruled by the act. In a previous part of the section it provides that the notice is to be affixed to the church or chapel doors, or other conspicuous place within each parish, between the first of June and the last of July, thus showing that some distinction must be made in serving the notices on the constables and overseers, and the posting of the notice on the church or chapel doors or other conspicuous place in the parish. Formalities in this respect are of great importance.

G. H. CROUGH (Workshop).

No. 21.—*Legacy to Married Women payable out of Real Estate—Assignment—Acknowledgment of—*
(*ante*, p. xiv).

These questions do not appear to me so dissimilated in character as to require different answers. Although dissimilar in facts, in point of meaning they are the same, for both legacies, being vested, are a charge on the real estate devised. And that they should be so considered in relation to the point under discussion, will, I think, be manifest from the further consideration of the question. I

shall, therefore, in proceeding to shew that the query here suggested, ought to be answered in the affirmative, treat them as one. The point at issue seems to be, whether in the case of a legacy to a married woman charged on land, any disposition thereof by her must be by deed duly acknowledged under the Fines and Recoveries Act. The cases cited in point (*Briggs v. Chamberlain*, and *Tuer v. Turner*) do not altogether bear upon the present case, for in each of those cases the married woman was entitled to a share of the proceeds to arise from the sale of certain real estate, not then actually sold, which would clearly constitute such an equitable interest in land, as to become subject to the provisions of the Fines and Recoveries Act, while here it does not appear quite so plain that an equitable interest exists ample enough to bring it under the same heading and rule as that contained in the above cases, for we have no evidence of a direct equitable estate, by reason of a direction to sell and an interest given in the proceeds, as in those cases, but, merely a charge created on the land to the extent of the legacy bequeathed. The decisions come to in the cases cited, do not seem to be grounded alone on the fact of the interest being a charge on the real estate, but, rather upon the more general principle of its being such an equitable estate, as is intended to be comprised in the provisions of the act. How far this distinction may be carried, I do not pretend to say. Certain it is, though, that this principle was recognised in both cases, and seems to have been the groundwork of the judgments. It may be doubtful whether under the term "*equitable interest*" can be comprehended a charge in respect of a legacy. I shall, however, deduce my answer to this point more from the act itself, and not rely alone on the cases cited. By sec. 77 of the Fines and Recoveries act, a married woman is empowered to dispose of any lands and money, and also to release, surrender, or extinguish any estate therein, as effectually as if she were a feme sole by deed duly acknowledged in the manner therein directed. On referring to the interpretation clause of this act, I find that the word "*estate*" shall be held to extend to an estate in equity, as well as at law, and to any interest charge lien or incumbrance in or upon or affecting any land &c. And I do not perceive anything in the context repugnant to this construction. I would, therefore, submit that the legacy referred to and under consideration in this point being vested, is a charge on the land, and consequently, on the wording of the above act, any assignment thereof by the married woman, must be by deed duly acknowledged by her.

W. H. RANGLES.

NOTE.—We are obliged to Mr. Randles for his

answer, and are surprised that a subject so interesting and important, has not been attended to by other subscribers. We trust before our next appears to receive the views of others, and perhaps Mr. Randles' answer may furnish matter for the formation of a sound opinion.—Eds.

EMIGRATION OF LAWYERS.—The following paragraph (which we take from the *Hampshire Independent*) is significant of the condition of the profession, and furnishes by no means a solitary example, as we know that several members of both branches have left the country and gone to the colonies, and all for the same reason, viz., that there is not occupation sufficient for them in this country. The Mr. Wise referred to is Mr. Edward Wise who, besides editing either in whole or in part some of the *Law Times* publications (but which were mere compilations), also produced an edition of the Bankruptcy Consolidation Act, with very useful notes, and to the second edition of which we have recently called attention:—"In the law report of a Sydney paper of the 18th June, we perceive that at a sitting of the Supreme Court on the previous Saturday, before the Chief Justice and Mr. Justice Therry, the Attorney-General moved for the admission of Mr. E. Wise to the bar of New South Wales. Mr. Wise had been called to the English bar in 1844. He had not received the certificate of this gentleman's admission, but this was of no consequence, as Mr. Wise was known to be the author of several legal works, and had not only brought letters of introduction from some of the judges, but was personally known to several of the members of the colonial bar.—Mr. Justice Therry said that he had himself the pleasure of knowing Mr. Wise while he was in England.—Their Honours directed the admission of Mr. Wise. There had been a precedent for dispensing with the certificate, and there could be no doubt whatever as to identity in the present instance. Mr. Wise was a barrister of the Western Circuit Bar, another distinguished member of which, Mr. R. Sewell, has, we understand, sailed for Australia, or is about to do so. We wish the learned and respected gentlemen every success in the land of their adoption, which their talents and legal acquirements so richly merit."

NOTICES TO CORRESPONDENTS.

"**STUDENT.**"—Mr. Holthouse's is the best compendious law dictionary, and it has not been so much affected by the alterations as the other works, but still there is much that is obsolete. For conveyancing, Williams, Burton, Hayes, or Watkins, according to your progress, in the order mentioned; for common law practice, wait for Lush's second edition by Stephen; for equity, either Ayckbourn or Smith's Practice; for bankruptcy, wait for new edition of Archbold, or, if inconvenient, get Wise's edition of Consolidation Act, or read the articles in CHRONICLE.

C. M.—The omission of your name from the list of correspondents was quite accidental, and is no ground for your refusing to have it re-inserted. Yours was not the only omission.

H. K. H.—It is quite uncertain when a new edition of Cruise will appear.

MOOT POINT, No. 106.—We find so much disagreement among our correspondents on this point, that we propose in our next to state our views, with a desire to terminate the discussion. We trust this will satisfy the six gentlemen who have sent communications respecting the matter.

READER B. A. C.—Yes, if you give notice by 1st of November; but it is not usual to give notice for examination only, and we would not advise you to do it; 2, within first seven days of the term; 3, yes; the Incorporated Law Society's secretary will not forward your views, as a notice for examination only is not approved of; 4, we do not know.

LIST OF CORRESPONDENTS.

The following names are to be added to lists at pp. x, 96:—Mr. G. H. Clough, at Messrs. Eddison and Clough, Worksop; Mr. H. K. Hebb, J. Moore, Esq., Lincoln; Mr. E. R. Jacques, Alma Chambers, 32, Paradise-street, Birmingham.

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DECEMBER 1, 1855.

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MOOT POINTS.

No. 29.—*Stamp—Apportionment of Freeholds and Copyholds.*

A. B. purchased freehold and copyhold lands of C. D. The purchase money (£500) is apportioned thus: freehold, £75; copyhold, £425—total, £500. The duty in respect of the freehold is 7s. 6d., but the conveyance contains a covenant to surrender the copyhold, and also the usual covenants for title, &c., in respect to both freehold and copyhold. Does the conveyance of the freehold, in consequence of the covenants affecting the copyholds, require any stamp beyond the 7s. 6d. one for *ad valorem* on the apportioned purchase-money of £75, the *ad valorem* duty in respect of purchase-money for the copyhold being conveyed on the surrender?

No. 30.—*Affidavit of Debt in Australia.*

By 5 Geo. 2, c. 7, s. 1, a person residing in Great Britain may prove a debt due to him from a person residing in the American colonies by affidavits. Can debts be proved in the Australian courts by affidavits? and if so, before whom must such affidavits be sworn?

No. 31.—*Legacy to Representatives of Married Woman.*

A., by his will bequeathed a certain legacy of £100 to B., and after her decease to C., the wife of D., and, in case of C.'s death before the legacy became payable, to her legal personal representatives according to the statute. C. dies before she becomes entitled to the legacy, leaving her husband, D., and two sons, E. and F, her surviving. D. makes his will, whereby he bequeaths the whole of his personal estate to his eldest son, E. Afterwards B. dies. Is the sole legatee E., or E. and F. jointly, entitled to their mother's legacy, and why?

J. R. C.

No. 32.—*Power of Appointment.*

The following point lately arose in our office, and is now under the consideration of counsel:—A testator devised real estate to his three sons to such uses as they should by any deed (instead of the usual form by any deed or deeds) appoint, and in default to themselves in fee. The sons lately executed a deed of appointment affecting only part of the estate, and the question has arisen whether the narrow wording of the power enables them to appoint the residue of the estate, or whether the power is exhausted. The mooter is inclined to think it is not, but that a liberal construction would be put upon the wording of the power, not taking "any deed" strictly in the singular sense, but as a generic term. The question would (it is submitted) be

equally important, if the appointment had been of the whole estate to one for life, and it was wished to convey the reversion in fee under the power by way of remainder.

Quære also, supposing the mooter to be right in the view he has taken, whether the construction would be equally liberal where the power is conferred by deed.

A. L. TROTMAN.

No. 33.—*Benefit Building Society—Uses to bar Dower.*

A freehold estate is conveyed to A. B. to uses to bar dower, who mortgages the same to the T. Benefit Building Society, and afterwards, on paying off the mortgage, obtains a receipt from the society under the 5th sec. of the 6th and 7th Will. 4, c. 32 (*vide* words of statute). A. B. subsequently obtains an advance from C. D., to whom he mortgages the estate. In case of A. B.'s death before paying off this mortgage, would his widow be entitled to her dower out of the mortgaged estate? This point is raised under the presumption that the estate became re-vested in A. B., discharged from the uses in the conveyance to him, and that, therefore, the wife would be entitled to her dower.

VIGILANS.

No. 34.—*Portreeve.*

What are the origin, nature, and duties pertaining to the office of Portreeve. W. G. (Lampeter).

No. 35.—*Assignment of Policy—Registering.*

Is it necessary to register an assignment of a policy of insurance under the Bills of Sale Act?

EXCELSIOR.

No. 36.—*Surveyor of Highways—Liberties.*

Will you be good enough to give me your opinion on the following point:—A certain parish (T.) is divided into so many liberties, and each liberty pays its own highway rates, but the said parish does not allow the parties residing in such liberty to choose their own surveyor. Now, I contend that the parish being so divided into liberties, and each liberty bearing its own highway rates, ought to have the option of choosing its own surveyor (see section 6 of the Highway Act, and the note (F) at the foot).

A SUBSCRIBER.

ANSWERS TO MOOT POINTS.

No. 21.—*Legacy to Married Woman Payable out of Real Estate—Assignment—Acknowledgment of (ante, pp. xiv).*

The two statements are practically the same: in both cases the legacy is a charge on real estate, and upon this point turns the question whether the deed should be acknowledged. The 77th section of the

stat 3 & 4 Will. 4, c. 74, enables married women to dispose of, release, or extinguish by deed acknowledged *any estate* in land, and the interpretation clause of the act extends the meaning of the word "estate" to an estate in equity as well as at law, and also to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity. The wife's legacy is an "interest" in or a "charge" upon the land, and therefore she is enabled to dispose of it. But any such disposition, to be effectual, must be by deed duly acknowledged.

If, however, the legacy is "being now paid," as is stated in the counsel's opinion quoted, it becomes the wife's personalty, to which the husband is entitled by marriage, and he alone may receive it, and give a valid discharge for it. But so long as it remains unpaid, and a "charge" upon the land, any assignment by way of mortgage or otherwise must be joined in by the wife, and she must acknowledge.

The legacy is, whilst unpaid, a chose in action, and the husband is entitled absolutely to all such interests when reduced into possession. If, therefore, the legacy is not reduced into possession by the husband, and if the wife does not join in any deed disposing of it, or if she does so join, but does not acknowledge the deed, she will still be entitled to the legacy if she survive her husband (see 3 & 4 Will. 4, c. 74; Hayes' Conveyancing, vol. 1, p. 208, *et seq.*, 5th edit.; Briggs v. Chamberlain, 18 Jur. 56, and the other cases and authorities cited by the mooter).

W. G.

NOTE.—Our correspondent has very ingeniously and adroitly seized upon the words "being now paid," which appear in the counsel's opinion, as stated at p. xiv, but this we apprehend must be a mistake of ours, at all events, it is opposed to the question, which speaks of a contract for the sale of the legacy to a stranger, and of a deed of assignment. We consider our present and former correspondent are correct, and that the assignment (not being a present payment of the legacy) should have been acknowledged. We feel disappointed that so few of our subscribers have taken any interest in a question of so much utility, and we cannot but contrast this with the readiness and even eagerness formerly exhibited by articled clerks in discussing topics of a like practical nature. W. G.'s answer arrived too late for insertion last month, and he has since favoured us with another communication, which, as being useful, we also give insertion to.

No. 21.—*Acknowledgement of deeds by married women* (*ante*, pp. xiv, xix).

About the latter end of October I wrote my answer to this moot point, but I suppose it did not reach you in time to appear in your November number, or

perhaps it was not "up to the mark." It has since occurred to me that as "grave doubts" (*ante*, p. xv) sometimes arise as to when married women should or should not acknowledge, we may reduce the point into the following rule:—That where a married woman is entitled to an interest in land, and even though pecuniary connected with land—in all such cases she must acknowledge.

In other cases the wife need not *necessarily*, I apprehend, be made a party at all (except in the case of a power, with which the Fines and Recoveries Act does not interfere). It may of course be advisable, and even proper, to make her a party in some instances—particularly where the husband's title accrues by marriage—but in this latter class of cases the husband may, in the absence of a settlement, effectually alienate alone. For instance, in the case of the wife's chattels real, and choses in action reduced into possession in his life time, as well as personalty in possession, of these the husband may himself dispose in virtue of the power which he *acquires* over them in his marital right; while as to the wife's reversionary interests in pure personalty, neither the husband alone, nor the husband and wife together, can by any form of assurance prevent her right by survivorship. W. G. (Lampeter).

No. 23.—*Judgment in Long Vacation on Writs specially indorsed* (*ante*, p. xviii.)

In case of non-appearance of defendant where the writ is indorsed in the special form, plaintiff may "at once sign final judgment" and issue execution in eight days after the last day for appearance (C. L. P. A. 1852; 15 & 16 Vic. c. 76, s. 27); and in practice, where the writ is specially indorsed and the defendant does not appear, judgment is signed and execution issued at all times of the year. No rule for judgment is now necessary (Reg. Gen. Hil. T. 1853, Rule 55); and all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation when signed (*Ibid.* Rule 56).

Formerly a rule for judgment *nisi causa* was necessary in the Queen's Bench after verdict, or on the return of a writ of enquiry. "It was a four day rule, and consequently interposed so much delay on the plaintiff's actually signing judgment. No such rule was necessary in the Common Pleas or Exchequer, but without such a rule the plaintiff was bound in effect to wait a similar time" (Governors of the Poor of Exeter v. Sivill, 7 Dowl. 624, per Coleridge, J.).

To remedy the inconvenience of this rule, it is enacted by the C. L. P. A. 1852, s. 120, that a plaintiff or defendant having obtained a verdict in a cause tried out of term, shall be entitled to issue

execution in fourteen days, unless the judge who tries the cause, or some other judge, or the court shall order execution to issue at an earlier or later period, with or without terms. No declaration, however, or other pleading can be delivered or filed between the 10th of August and 24th of October (2 Will. 4, c. 30). The C. L. P. A. makes no alteration in this respect (Reg. Gen. Hil. T. 1853, Rule 9). W. G. (Lampeter).

No. 24.—*Separate estate—Husbands concurrence* (ante, p. xviii).

I think B.'s consent alone would be sufficient as it was settled for her sole and separate use.

J. T. B.

No. 25.—*Devise of Crops* (ante, p. xviii).

Maunder gives the meaning of the word "crop" as the *harvest produce*. The Latin "messis" denotes a "harvest" or "crop." "Messor" is a "reaper" or "mower." Now it cannot be said that "crops" were on the testator's land at the time of his death, as they were in mere embryo. And though, as the testator died in July, they must have been forward, yet, had they been at that instant cut, they would only have been useful as manure. I can find no cases in point, but I incline to the opinion that the court would give effect to the evident *intention* of the testator, and award B. the crops which were in an incipient condition at the date of his death.

F. W. F.

No. 26.—*Articled Clerk—Death of Master* (ante, p. xvii).

Reasoning from analogy to the cases decided in regard to articulated clerks, I think that A. has claim for a return of a portion of the premium, assuming that he establishes incapacity on the part of B. By 6 & 7 Vic. c. 73, where by death of the master, enables the clerk to bind himself to another attorney for the residue of the term; and the cases of *ex parte Dalton*, 9 Dowling, 110; *ex parte Lewis*, 13 Law Journal, 261; or *ex parte Bayley*, 9 B. and C.; *ex parte Haden*, 2 Jur. 878 (the nearest I can find in point, though Mr. Baker may as well refer to all I have quoted), seem to affect *attornies and their clerks* exclusively. I therefore think that A.'s remedy would be for proved damage resulting from the death of C. in the ordinary way.

F. W. F.

No. 27. *Mortgagee's Liability* (ante, p. xviii).

It is quite clear that a satisfied mortgagee is a trustee for his mortgagor within the meaning of the Trustee Act, 14 & 15 Vic. c. 60; and I think, that there can be no doubt that such a satisfied mortgagee (with notice, is as fully and effectually a trustee for a mortgagee of the equity of redemption as he would

have been for the mortgagor had such equity of redemption remained unincumbered. I submit, then, that B. not only has no right to hand over the deeds to A. without informing C. thereof, but that he is liable in equity to C. if he parts with the deeds at all without his consent.

A. L. TROTMAN.

No. 28.—*Power to will exercised by codicil* (ante, p. xix).

If a power be directed to be executed by a will, and it is executed by an instrument testamentary in its nature it is good (*Sugden on Powers v. Archbold*, vol. 2, p. 223).

J. T. B.

NOTICES TO CORRESPONDENTS.

J. C. O.—You must take out a certificate within twelve months after admission, otherwise you will have to apply to a judge, on a terms notice, for leave to take out a certificate.

R. W. S.—It will not apply to you.

LEX.—We are unable to mention any name. Almost any Barrister would take you for the regular fee.

NOTICE.—We are sorry we have not had room in this number for all the examination answers or for so much summary as usual. Also for some matters we had promised to notice, which, however, shall all receive attention in next Number.

S. M.—The new edition of Jarman on Wills is out.

T. J. P.—Write to the Secretary of the Law Students Society at the Incorporated Law Society, Chancery Lane, London. You will be in time for Easter Term.

N. A.—We do not know when the new edition of Flathe's Archbold will appear. There is another work by Mr. Archbold himself, but we have not seen it.

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ANSWERS TO MOOT POINTS.

No. 20.—*Devise—Mortgage or Sale* (*ante*, p. xiv).

By the wording of this point, I imagine Ralph Harrison had arrived at the age of 26 before his aunt's death, if so I agree with the mooter as to his being able to deal with the property as he pleases without the consent of Maria Philipson, but I cannot at all understand his having been able to do so at 21; for, had he not attained the age of 26 at the time of his aunt's death, the property would have descended to the heir of the testatrix until the contingency happened, and in the event of Ralph Harrison's death, to Maria Philipson, according to the terms of the will (see *Fearne on Contin. Rem.* 851). J. T. B.

No. 28.—*Power to Will exercised by Codicil*, (*ante*, p. xx).

I am clearly of opinion that the power to appoint by will exercised by codicil was a good execution of the power, as every codicil is considered as forming part of the will, it not being affected thereby otherwise than to give effect to such codicil; and by the new Statute of Wills, 7 Will. 4, and 1 Vic. c. 26, s. 1, the term "will" is to be construed to extend to a testament, and to a "codicil," and to an appointment by will or by writing in the nature of a "will" in exercise of the power.

E. R. JAKES (Handsworth).

No. 29.—*Stamp—Apportionment of Freeholds and Copyholds* (*ante*, p. xx).

The covenants to surrender, and for the title to the copyholds, are *incident* to the sale and conveyance of the property sold, although they may be collateral to the conveyance of the freehold portion of it, therefore the ordinary deed stamp is *not* requisite in this instance, in addition to the *ad valorem* duty in respect of the property conveyed (*Tilsley's Stamp Laws*, 1847, p. 264). If, however, there should still be any doubt upon the subject, the conveyance can be taken to the stamp office, and if, or when it shall be stamped with the full duty with which it shall in the opinion of the commissioners be chargeable, the commissioners are required, on payment of 10s., to affix a *denoting stamp*, which signifies that the full and proper duty has been paid, and which will preclude any question that can afterwards arise as to the sufficiency of the stamp duty (13 & 14 Vic. c. 97, s. 14).

FREDERICK SMITH (Witham).

No. 29.—*Stamp—apportionment of freeholds and copyholds* (*ante*, p. xxii).

This deed must have a full *ad valorem* duty on the amount of purchase money for both freehold and

copyhold. The covenant to surrender passes no legal interest in the copyhold, and under 13 & 14 Vic. c. 97, no covenant of that kind except made in a *separate deed*, seems to be chargeable. F. W. F.

No. 31.—*Legacy to Representatives of Married Women* (*ante*, p. xxii).

I apprehend the terms of A.'s will are such that the legacy should be payable to the legal personal representative of C. at the time of her decease, and not to her legal personal representative at the time the legacy should be payable; thus it would remain part of her personal estate to which D., being such representative (see 29 Car. 2, c. 3, s. 25), should take out letters of administration, and by his will E. would be solely entitled. J. T. B.

No. 31.—*Legacy to Representative of Married Woman* (*ante*, p. xxii).

This was a legacy, in the event which happened—namely, the death of C.—to "C.'s legal personal representatives according to the statute"; and the question here is, who are such representatives? I think the husband (D.) answers the description, for he was C.'s legal personal representative, although he also died before B. The legacy was vested contingently in C. during her lifetime, but she did not survive the contingency, and therefore upon her death the legacy vested absolutely in D. (the husband) as answering the description in the will, and the legacy would not lapse by reason of his dying before B. He was C.'s legal personal representative, notwithstanding he did not survive the period when the legacy became payable. It may be urged that the testator, by the words "according to the statute," meant the statute of distributions (23 Car. 2, c. 10), but the 29 Car. 2, c. 3, sufficiently meets this argument. It is not the next of kin, but the legal personal representative who is entitled. The husband could therefore dispose of the legacy in the manner mentioned, and the sole legatee (E.) is entitled to the legacy.

W. G. (Lampeter).

No. 31.—*Legacy to married woman* (*ante*, p. xxii).

Had the bequests over to C. (in the case supposed) been absolute, D. would be clearly entitled, by taking out letters of administration, to bequeath the legacy as a reversionary chose in action to E. And the only effect of the ultimate bequest to the legal personal representatives of C. (in the event of her death before the vesting of the legacy) is to give D. a new title as legatee. I have formed this opinion on the ground that (in the absence of any words showing a contrary intention) the legal personal representative must be formed by referring to the death of C., and not to the date of the vesting

of the legacy, and I can see nothing on the face of the will indicating such contrary intention: and I consequently submit that E.'s title as sole legatee under the will of D. must prevail.

No. 32.—*Power of Appointment partially executed* (ante, p. xxii).

Powers of appointment and revocation need not be executed to the utmost extent at once, but may be executed at different times over different parts of the estate, or over the whole estate, but not to the full extent of the power. Where a man has a general power of appointment he may execute it at several times, and appoint an estate for life at one time, and the fee at another time (*Bovey v. Smith*, 1 Vern. 84); and the same of a power of revocation (*Snape v. Turton*, Cro. Car. 472; and *Bullock v. Thorne*, Mo. 675); and so also of powers of jointuring, provided that the party do not in all the executions exceed the limits of the power (*Sugden on Powers*, vol. 1, p. 311).

W. G. (Lampeter).

No. 32.—*Power of Appointment* (ante, p. xxii).

This point might perhaps have been of some importance had not the three sons had the remainder in fee (in default of appointment) in themselves. As they have such remainder, I cannot see what there is to prevent them passing the fee simple of the unappointed part of the estate to a purchaser. There is not a shadow of a doubt but that this can be done in this manner. First let them appoint the estate, and then, by way of further assurance, "grant and convey" the same. So, if the appointment fails, the "grant" must take effect, as they have the remainder in fee. I will now consider the point before me—viz., whether the power is in this case exhausted?

I am decidedly of opinion that it is not—first, because I conceive that the words "any deed" do not confine the devise to one deed, even if taken in a strictly legal sense. Why, "any deed" surely cannot mean one deed, and no more. The word "any" implies more than one.

The sons exercise the power over part of the estate by a deed. As to that part it might be contended (with doubtful success, unless the appointment was an absolute one) that the power was exhausted. But the whole of the estate was given to the sons. As to part of it, no deed had been executed. Therefore, upon the face of it, an appointment of this part would come under the words "any deed."

Again, it is law that one power of appointment may be exercised by several different assurances (*Leicester's Case*, 1 Vent. 278; *Herring v. Browne*,

1 Vent. 368), and at different times (*Digge's case*, 1 Rep. 173; *Sir K. Lee's case*, 1 And. 67); and *Lord Kenyon* (2 Term Rep. 721) said that "a power may be executed at different times, if not fully executed at first" (which it very clearly was not in this case).

And, lastly, it is a well known rule in construing wills that the intentions of a testator are rather to be looked at than his words, and where those intentions are clearly expressed, they will, if possible, be carried out. Here it is most clear that it could by no possibility have been the testator's intention that his sons should have power to appoint part only of the estate. In fact, a contrary intention is expressed by giving them a power over the whole. Therefore I apprehend the power is not exhausted, but *pro tanto* only. For these reasons I think that the sons can appoint the residue of the estate.

CHAS. CYDWELYN ELLIS (Ruthin).

No. 34.—*Portreeve*, (ante, p. xxii).

A portreeve (from port an haven and reve an officer) was the King's Bailiff who looked after the customs and tolls in the port of London before they were let to fee farm. This office, however, is not I believe peculiar to the Port of London. F. W. F.

No. 35.—*Assignment of Policy—Registering* (ante, p. xxii).

It is not necessary to register an assignment of a policy of assurance under the Bill of Sales Act, as assignments of policies do not come under the head "personal chattels." The act expressly says, that the expression "personal chattels," "shall not include chattel interest in real estate, nor shares or interests in the stocks, funds, or securities of any government or in the capital or property of any 'incorporated' or joint stock company." One reason why the Bill of Sales Act was passed was, that mortgagors should not borrow money on the same furniture or personal chattels from different mortgagees, so that on searching, people would know whether the property is already mortgaged, but mortgagors borrowing money on a policy of assurance hand over the policy to the mortgagee, consequently would be unable to produce it to borrow more money on the same policy. The act therefore, for this purpose would be useless.

C. N. ALDRITT.

No. 35.—*Assignment of Policy Registering* (ante, p. xxii).

An assignment of a policy of insurance being simply a chose in action, does not require registration (see the Interpretation clause of Bills of Sale Act, 17 & 18 Vic. c. 86).

J. T. B.

No. 35.—*Assignment of Policy Registering*
(*ante*, p. xxii).

If the insurance company has been completely registered pursuant to the Joint Stock Companies' Registration Act (7 & 8 Vic. c. 110), it is a corporation, and a person holding a policy in such company has an interest in the capital thereof; and inasmuch as the expression "personal chattels" in the Bills of Sale Registration Act (17 & 18 Vic. c. 36) does not include *shares or interest in the capital or property of any incorporated or joint stock company*, I am of opinion that an assignment of such policy does not require to be registered.

FREDERICK SMITH (Witham).

No. 35.—*Assignment of Policy—Registering*
(*ante*, p. xxii).

By sec. 7 of 17 & 18 Vic. c. 36, the expression "bill of sale" is declared to include "bills of sale assignments &c., and other assurances of personal chattels," and it is pointed out what documents are not bills of sale within the meaning of the act. Whether a policy of assurance would be deemed to fall within the designation of one of the exceptions viz: "capital or property of any incorporated property—or choses in action"—seems therefore the question for consideration; and as a policy of assurance is unquestionably a chose in action I think filing such an assignment (which indeed is only available in equity) is not required.

F. W. F.

No. 36.—*Surveyor of Highways Liberties.*
(*ante*, p. xxii).

Sec. 14, seems to let this question at rest. In the previous clause (13), power is given to unite parishes into districts, but the former clause directs the justices to appoint "one fit and competent person to be the surveyor for such districts."

F. W. F.

ARTICLED CLERK—SERVICE.

1. Can a clerk, who has served part of the term under his articles, but who in consequence of ill health, left the profession for six months, and entered into a more active business, be bound by fresh articles to the same master for the residue of the term? See 6 & 7 Vic. c. 73, s. 13.

2. And, if he can, what duty ought to be paid on the second articles? See Pulling's Law of Attorneys and Solicitors, 2nd edit., p. 25, note, 9. B.

If the discontinuance were really in consequence of ill health, and there has been an intermission of not more than six months, no fresh articles are necessary, but the clerk should serve the six months after the expiration of the articles. However, the

better way is to enter into fresh articles, which must be stamped with the full stamp, but the old stamp will be allowed, or at least to the value of the present stamp.

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J. T. B.—The address at Hexham is quite correct, and any letter will reach the party.

A. L. T.—You must get a paper from the Inn of Court, and get same signed by two barristers certifying as to your respectability, &c.; you will have about £35 to pay for admission, and, if no degree, to deposit £100, which will pay for your call. We will insert your communication in next: it has been accidentally omitted, being put away with letters to be answered.

No. 106.—We are quite ashamed to say, that we have not yet attended to this; the party who promised to notice it and has got the letters has failed hitherto to perform his promise. We trust, however, next No. will contain the notice.

LEX (Manchester).—We will get our contributor to hasten the conclusion of the articles referred to, but it is rather a difficult matter to get such parties to furnish copy, except when they have leisure from more pressing matters.

S. J.—You should write to the secretary; we have no doubt he would readily furnish the information.

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Wednesday, 5th December, 1855.—Moot Point, 192.

A power of sale and exchange, with the consent of the tenant for life, was given to trustees under a settlement. Judgments were afterwards entered up against the tenant for life and duly registered. Can the trustees sell without the consent of the judgment creditor?

The 1 & 2 Vic. c. 110, s. 13, having given to a judgment the effect of an equitable charge to the amount thereof upon all the lands of the judgment debtor, it was contended in the negative of the question that the tenant for life had, by suffering the judgment, precluded himself from giving the consent required by the power, or of doing any other act which might in any way affect the interest of the judgment-creditor, which interest might be seriously prejudiced by an improvident exercise of the power in question; and in support of which view the case of Noel and Lord Henley (M'C. and Y. 302) was referred to, where it was held that a tenant for life had, by parting with his life interest in a fund, thereby precluded himself from exercising a power of advancement contained in the settlement; but to this it was replied, that this and similar cases were all decided on the principle that a man could do no act in derogation of his own grant, and that as a judgment was a proceeding *in invitum*, the question was not affected by them, and, further, that in case of any substitution of the trust property under the powers of the settlement the judgment-creditor would have the same remedies against the substituted as he had against the original estate, and that any improvident exercise of the power would be a breach of trust by the trustees, notwithstanding the consent of the tenant for life, and which breach the law never presumed an intention to commit. The question, however, appears to be virtually settled by the case of *Walmsley v. Butterworth* (L. J. R., vol. 13. c. 253), where it was held by Sir C. C. Pepys, M. R., that a mortgage by a tenant for life under a settlement of his whole interest did not destroy his power of consenting to a sale by the trustees, and which case it would appear has the approbation of Sir Edward Sugden (*vide* his Treatise on Powers, 7th edit. p. 64).

The meeting decided in the affirmative.

Wednesday, 19 December, 1855.—Moot Point 193.

A. devises to B. in fee, with a proviso that if B. alien in C.'s lifetime the estate should go to C. Is the proviso valid?

The law not allowing property to be bestowed upon another deprived of any of its incidents, the principal of which is the right of alienation, and yet

undoubtedly allowing such right to be subject to a partial restraint, such as a condition that the feoffee shall not alien to any named person or his heirs, which condition does not take away all power of alienation from the feoffee (see Co. Lit. 222 b; 223 a; and 223 b; and Sir A. Mildmay's case 6 Reports), or a condition against alienation except to persons named, such as to sisters or their children (*Gill v. Pearson*, 6 East, 173); it was contended in the affirmative of the moot point that a restraint in point of time as well as of person was good, such restraint being reasonable, and not trenching upon the law against perpetuities. Large's case (in 29 Eliz.) 2 Leon. 82, and 3 Leon. 182; *vide* also *Churchill v. Marks* (1 Coll. C. C. 441), where an eminent conveyancing counsel is said to have declared, in an answer to a question of Knight Bruce, V. C., that the proviso in the moot point would be valid.

In the negative it was replied, that as the policy of the law favours alienation, it seems doubtful whether a restraint upon alienation, even for a reasonable time, would be valid, the only reason given by Coke for allowing a partial restraint as to persons being that it does not take away all power of alienation; and the decision in Large's case upon which the speakers in the affirmative relied, being on the question whether a sale had been made within the proviso against alienation, and not whether the proviso itself was valid. If a reasonable restraint as to time be allowed, it seems hardly possible to contend that a restraint for the life of another would be within the rule, being a restraint which would in all probability take away all power of alienation from the donee, when the proviso would fall within the case of *Ware v. Carr* (10 B. and C. 449), in which case, on a devise to A. B. and his heirs for ever, but if he died without heirs, then to C. D. and his heirs, or in case A. B. mortgaged or suffered a recovery, then to C. D., the Court of Queens Bench certified that A. B. took an estate in fee, with an executory devise over to take effect on a condition void in law, and that a purchaser in fee from A. B. would have a good title against all persons claiming under the will.

The meeting decided in the affirmative by a majority of one. THOMAS HORTON, Hon. Sec.

SOLICITORS' COSTS IN CHANCERY.—It is anticipated that the Lord Chancellor will shortly make a revision of the scale of allowances to solicitors practising in Chancery, so as to make proceedings in equity more remunerative than at present.

LATE BARON PARKE.—After all, this judge on his retiring from the Exchequer has accepted a life peerage under the title of Lord Wensleydale.

MOOT POINTS.

No. 45.—*Mortgagees—Notice—Priority.*

A. mortgages an estate to B. for £1,000, B. leaving the deeds in the possession of A., A. afterwards mortgages the same estate to C. for £800, and subject to the latter he mortgages the same to D. for £300; D. omits giving notice to C. of his incumbrance for a fortnight, and in the meantime it is made known to C. that the estate was already in mortgage to B.

Where the first mortgagee allows the mortgagor to retain the title-deeds he is postponed to a second mortgagee, but would he not in this case be postponed to a third, it being his own neglect that he has been placed in the position that he now is. Otherwise it would be doing the greatest injustice possible to D., he not having any means whatever of ascertaining that the estate was charged with the payment of any other sum than C.'s mortgage for £800.

In this case B. wishes to pay off the mortgage to C. for £800, and take up the deeds, but D. insists upon C.'s handing them over to him, and that he is entitled to them in preference to B., although he C. received notice of B.'s mortgage, previous to that of D.'s. But the priority of notice in this case, I am of opinion, will not entitle B. to a preference.

And again, suppose that D. obtained a transfer of C.'s mortgage, and being ignorant of the existence of B.'s prior incumbrance, obtained from A. an assignment of the equity of redemption, would D.'s estate be at all affected by B.'s prior mortgage?

E. R. JAMES (Handsworth).

No. 46.—*Pew in Church—Conveyance.*

By an instrument dated about twenty years ago under the hands and seals of the churchwardens of a parish in Somersetshire, it appears that they had erected several seats or pews in the church, and that it had been agreed in vestry that the expense thereof should be raised by subscriptions, and that each subscriber should have one of such seats or pews allotted to him. A. B. who is seized in fee of a dwellinghouse in the parish became a subscriber, and one of the pews was, by the churchwardens appropriated and confirmed to him, and the succeeding owners of the dwellinghouse and their families for ever. A. B. has sold the house with the pew. Qy.: would A. B.'s conveyance of the house pass his interest in the pew, without alluding to it, under the general words.

HUBERT WOOD (Yeovil).

No. 47.—*Filing assignment of personal chattels.*

A. assigns the lease of a house, together with furniture and tenants fixtures, to B. absolutely.

Possession is given on the delivery of the deed. Does the assignment require to be registered pursuant to the recent bills of sale act?

J. G. B. EDWIN.

No. 48.—*Right to distrain or sue.*

A. carries on the business of a warehouseman, and sells the good will thereof to B. At the time of the sale certain persons are indebted to A. for rent in respect of their depositing goods at his warehouse, and he executes a power of attorney to B. to receive the arrears for him. It is desired to know what remedy B. has on behalf of A. to recover the sums so due, considering that he has surrendered up possession. Has A., by that act, destroyed his power to distrain, supposing that he had that power previously to parting with possession? If he has, would B. on A.'s behalf be justified in delivering over the goods on demand, notwithstanding a sum be due on them? If B. would, it is conceived the only remedy he has on behalf of A., would be to resort to an action to recover the money? And what power has B. in his own right, as A.'s successor, to recover any arrears that may become due to him in the course of the same business? It is thought by the mooter that he certainly has power to distrain.

J. G. B. EDWIN.

No. 49.—*The varying of habendum from the delivery of a deed.*

In the assignment of personal chattels and incorporeal personal chattels, should the habendum of the deed be made to hold from the date of the deed? or, would it be good for the habendum either to be made anterior or prospective to the date of the deed? No doubt this may be done with respect to leasehold interests, but it is questioned, whether the same rule would apply to absolute assignments of personal chattels, corporeal and incorporeal.

J. G. B. EDWIN.

No. 50.—*Attorneys and Solicitors.*

If an articulated clerk receive money, in the shape of fees, for business done by him during his clerkship, would this be ground for objection to his admission as an attorney and solicitor?

FIDES.

No. 51.—*Husband and Wife—Acknowledgment of deed.*

A. B. (both feme sole) and C. lent a sum of money upon mortgage of a leasehold estate, and further secured by a mortgage of the equity of redemption in a freehold estate. The mortgagor became bankrupt, and his assignees offered the mortgaged estates for sale; the freehold portion was sold, the first mortgage discharged, and the balance paid in part liquidation of A. B. and C.'s mortgage. A. intermarried, but no settlement was made of the mortgaged estate nor the money secured thereon. A.

and her husband, the trustees under a settlement on B.'s marriage, and her husband (who had a life interest in B.'s share) and C. agreed to transfer the balance of the mortgage debt and interest, and the remaining security, viz., the leasehold estate (for a sum less than the amount due upon the security) to D. and E. A., with her husband, is made a party to the transfer.

Query.—Is it necessary that the transfer of the leasehold should be acknowledged by A. under the 3 & 4 Will. 4, chap. 74? J. G. H.

No. 52.—*Insolvent Debtors Court—What is a Contempt of Court,*

I was astonished by the decision of a judge of the county court given under the following circumstances, and seek for the opinion of some gentleman conversant with the question. I should likewise feel obliged by a reference to a case in point, where I might see the matter discussed, it appearing to me that the judge much exceeded his authority. A *ca. sa.* having issued against a debtor, he (expecting the same) proceeded, in company with his solicitor, to the court to petition it for protection; some other business being then under discussion, his solicitor left the court for a while; he, however, still remained. The plaintiff's attorney, happening to be there, saw him, and before the matter was in any way brought before the judge or entered into sent for the officer having the *ca. sa.*, and had him arrested; but as the bailiff was leaving the court with his prisoner, the other attorney chanced to return, at once ordered both to remain, and immediately addressed the judge as to whether his client was protected by being in court or not. The judge, much to the dismay of the plaintiff's solicitor, declared that he was—telling the bailiff at the same time that if he did not release his prisoner he should commit him for contempt, on which the officer complied, the plaintiff's solicitor having first intimated to him that if he let the man go he should bring an action against him (the officer) for an escape. Was the judge justified in acting as he did (it will be observed that the debtor attended of his own free will, and not on compulsion), and will an action lie against the officer? RONAN CLIFFE.

No. 53.—*Stamp—Bill or Draft.*

"G. Jan. 1, 1856.

"Pay A. or order £100.

"B.

"To L.'s Banking Company, Y."

This instrument is impressed with a 1d. stamp, and having been dishonoured, A. was about to bring an action against the drawer, but his solicitor has advised him not to do so, on the ground that it is a *Bill of Exchange*, and not a *Draft*, being made

payable to A. or order (not bearer) and that consequently it required a 1s. stamp. Is the advice which has been given to A. correct?

HUBERT WOOD (Yeovil).

NOTICES TO CORRESPONDENTS.

S. H. T.—We are not able to say, not having seen the other work, which indeed is not yet published.

M. J. It is impossible for us to say when Jarman's Conveyancing will be complete, and the same of the new edition of Davidson. The first vol. of the latter work is a very useful one, so far as relates to recitals, common forms, and conditions of sales.

S. T. C.—We do not believe that any barrister will take less than the regular and usual fee. There are some persons who profess to prepare students for the examinations who may take less.

X. Y.—(Birmingham) write to the secretary of the Incorporated Law Society in Chancery Lane, and he will furnish you with the information. See also what is stated in the present No. as to the reduced subscription.

F. C. G.—We have seen two only of the numbers of Mr. Drewry's Practice, and, therefore, cannot yet form an opinion of its utility. Mr. Ayckbourn's is a good work, and so is Mr. Smith's. The new edition of Daniel by Mr. Headlam, will probably be the best text-book, but it is more for barristers than for solicitors.

A. T. G.—We cannot give you any opinion as to your chances of success, without having some knowledge of your previous requirements and capacity. If you really find the majority of your answers correct, you may conclude that you have a good chance of passing.

LIST OF CORRESPONDENTS.—The following is the only name added to the lists at pp. x, 96, xx, 168, xxviii, viz., Mr. James Hutchinson, of No. 8, Horton Road, Bradford, Yorkshire. The name of Mr. C. Fairer, is to be *erased* from list at p. x, as he is now too much engaged to correspond.

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ANSWERS TO MOOT POINTS.

No. 45.—*Mortgages—Notice—Priority*
(*ante*, p. xxxi).

The rule laid down by Mr. Jaques as to the postponement of a first mortgagee (who has allowed the mortgagor to retain the title deeds) to a second mortgagee who has acquired them, is more general than is warranted by any authority I can find. Lord Eldon in the case of *Evans v. Bicknell*, 6 Vesey, 190 stated the doctrine to be "that the mere circumstance of parting with the title-deeds unless there is a fraud concealment or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone a first mortgagee." The same doctrine is recognised by Eyre, C. B., in *Plumb v. Fluitt*, 2 Anst. 432, with this additional qualification: "that a failure of the utmost circumspection does not amount to such fraud or wilful neglect." A failure to take the deeds *ab origine* (as in the case supposed), seems to be more favoured by the court than a re-delivery of them, when once taken up, to the mortgagor. C. then has no equity capable of prevailing over B.'s legal estate, unless he prove such fraudulent intention or gross negligence as aforesaid, and the onus of such proof lies on him. With regard to D., the third mortgagee, his omission to give notice of his security to C. quite deprives him (in my opinion) of all equity, which he might otherwise have to demand the deeds from C. I think, there can be no doubt, that C., as a satisfied mortgagee, would be a trustee for B., as having (by priority of notice), a preferable equity. With regard to the secondary point raised, I cannot see that B.'s original position is at all compromised by the transfer of C.'s mortgage, and the assignment of A.'s equity of redemption, though D.'s position is doubtless considerably improved. The relative position of the parties would seem to be this; B. has the estate, D. the deeds, each party having an unimpeachable right as against the other to retain what he thus possesses.

A. L. TROTMAN.

No. 46.—*Pew in Church—Conveyance* (*ante*, p. xxxi).

Blackstone, in defining a deed, says, "It must be taken as to its intention, provided the intention is clear." In this case it is evident (provided the house was conveyed with its appurtenances, see Co. Litt. 1216) the intention was to pass the house with its appurtenances, and showed (supposing the pew to be appurtenant to the house), the grant of the house simply (see Stephen's Com. 1st. Edit. vol. 1 p. 449), without using the word appurtenances, is

sufficient to pass the pew. The only difficulty in this case arises as to A. B.'s right to convey the pew, or whether the pew is appurtenant to the house. See vol. 2 Law Chron. p. 252.

G. W. CLOUGH (Workshop).

No. 47.—*Filing Assignment of Personal Chattels*
(*ante* p. xxxi).

The Bills of Sale Act, 17 & 18 Vic. c. 36, s. 1, provides for the filing or registering of every bill of sale of *personal chattels*, and to this expression the interpretation clause of the act gives the following meaning: "*The expression 'personal chattels,' shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery, and shall not include chattel interests in real estate,*" &c. The construction, therefore, of this clause, in relation to the point mooted, would decide, that so far as the transfer of the furniture and tenant's fixtures is intended to operate as a legal disposition thereof under this act, the bill of sale must be registered: but that by reason of the lease of the house being a chattel real, and incapable of complete transfer by delivery, the bill of sale, considered in connection with that balance, does not require registering. The course, however, in a case of this kind, would be to register.

W. HENRY RANGLES.

No. 47.—*Filing assignment of Personal Chattels*
(*ante*, p. xxxi).

Immediate possession being given by the assignor, this assignment will not require to be registered. Registration is only necessary where there is no likelihood of the possession of the goods and chattels comprised in the assignment, being retained by the assignor beyond twenty-one days from the execution of the deed (17 & 18 Vic. c. 36 s. 1).

FRED. SMITH (Witham).

No. 47.—*Filing Assignment of Personal Chattels*
(*ante*, p. xxxi).

In this case it is not necessary to register the assignment, as possession of the furniture, &c., was given to B. on the delivery of the deed, and I presume that they are now publicly used by him as his. The act was merely passed to prevent frauds being committed on creditors by secret bills of sale, and it is only requisite to register bills of sale, &c., when the chattels assigned thereby are in the "possession or apparent possession" of the person making such assignment (see Bills of Sale Act, 17 & 18 Vic. c. 36, s. 1).

ROMAN CLIFFE.

No. 49.—*The varying of the Habendum from the Delivery of a Deed* (*ante*, p. xxxi).

The common law restrictions on the alienation of real property *in futuro* were grounded on the feudal necessity of actual seisin being given at the moment

the estate passed out of the grantor (i. e., at the time of the execution of the deed), coupled with the maxim, "that the freehold could never be without an owner" (which would have been the case if the habendum were "to hold" from a date posterior to the date of the deed). The feudal principles never having applied to personalty, notoriety of possession has never been of importance, nor actual delivery of the thing granted essential to the validity of the conveyance (except where such conveyance is by way of simple gift). Incorporeal, personal chattels cannot be susceptible of actual delivery, any more than a remainder could formerly be the subject of livery of seisin. The restrictions on alienation in *futuro* being entirely of feudal origin, I cannot see why the date of the habendum may not be prospective to the date of the deed, and I can think of no legal rule, which should prevent it being anterior.

A. L. TROTMAN.

No. 51.—*Husband and Wife—Acknowledgment of deed (ante, p. xxxi).*

I do not think the act of 3 & 4 Wm. 4, c. 74, applies to leaseholds; although by sec. 77 the words "lands of any tenure" are made use of, I imagine only freeholds are meant. It was not necessary to levy a fine on a sale of leaseholds by a married woman previous to the passing of this act, and as the act was passed for the purpose of abolishing fines and recoveries, and substituting acknowledgments in lieu thereof, I apprehend an acknowledgment by A. is unnecessary.

R. H. H.

No. 51.—*Husband and Wife—Acknowledgment of Deed (ante, p. xxxi).*

It is not necessary that this transfer should be acknowledged by A., because the husband, by virtue of the marriage, becomes absolutely possessed of his wife's chattels real, and has the power of complete alienation, without even making his wife a party to the assignment, provided the fact of the marriage be established.

This I believe to be an established rule of law.

J. G. B. EDWIN.

No. 51.—*Acknowledgment of deed (ante p. xxxi).*

The question here is whether the mortgage security held by A. is "an estate or interest" in land within the operation of the act 3 & 4 Will. 4, c. 74. Mr. Burton, in his "Compendium of the Law of Real Property," thus defines an estate (p. 3),: "the degree of property which a person has in lands or tenements, if sufficiently perfect." At law the mortgagee is considered as absolute owner of the mortgaged estate, and his degree of property therein has consequently the legal attribute of perfection. True, leasehold property is for many purposes personalty,

but still the owner of it has, I think, "an estate in land." At all events it comes under the more general denomination of "interest in land;" I think then, there can be no doubt that the proposed transfer must be executed in conformity with the above mentioned acts, as passing an "estate or interest in land" within its letter and meaning.

A. L. TROTMAN.

No. 51.—*Husband and Wife—Acknowledgment of Deed (ante xxxi).*

I think there is no doubt that the 3 & 4 Will. 4, c. 74, authorising alienation by married women of their interests in lands, &c., with certain formalities, extends to leasehold property as well as freehold; the only tenure exempt from its provisions being copy of court roll,—for sec. 77 provides for the disposition of lands by the married woman by deed duly acknowledged by her. And the interpretation clause of the act defines lands to include "Manors, advowsons, and messuages, &c., of any tenure (except copyhold, unless where so expressed), and hereditaments, corporeal and incorporeal." So that it is evident leaseholds are intended to be comprised in the extent of the act, and consequently any assignment thereof by a married woman should be acknowledged.

W. HENRY RANGLES.

No. 51.—*Husband and Wife—Acknowledgment of Deed (ante, p. xxxi).*

By the 3 & 4 Will. 4, c. 74, a feme covert is empowered during coverture, with the concurrence of her husband, to dispose of her real estate. Leaseholds, it is needless to say, are not real estate; but being chattels real, the effect of marriage is to vest them in the husband; therefore, although A. be made a party to the transfer, it is not requisite that she should acknowledge it, because her husband has full power to dispose of her chattels real during the coverture without her concurrence (Robert's Work on Equity Jurisprudence, p. 226; Jarman and Bythewood's Conveyancing, vol 9, p. 10).

FRED. SMITH (Witham).

No. 53.—*Stamp—Bill or Draft (ante, p. xxxii).*

I should respectfully submit that the advice given to A. by his solicitor is wrong. I take the document to be a draft or order, drawn upon a banker for a sum of money, payable to order, on demand, and therefore comes within 16 & 17 Vic. c. 59, s. 19. Had the document been drawn on a private individual and not on a banker, then I conclude the solicitor's advice to A. would be correct, and the document would require a one shilling stamp.

R. H. H.

No. 53.—*Stamp—Bill or Draft* (*ante*, p. xxxii).

The instrument referred to in this question does not possess, to me, any but the common qualities of an ordinary cheque or draft on the drawers' bankers; the only difference is, it is payable to A's. *order* instead of to *bearer*—a very good plan, in my opinion, and one which is adopted by many in preference to the usual practice of, to bearer, as attended with far greater safety. I should decidedly say that there are contained in this instrument the constituent parts of a cheque, and not of a bill of exchange. The addition of the words "or order," and the impression of the penny stamp only renders it necessary that A. should indorse it before cashing it, which is a safe means of insuring payment to the proper party, and also a good way of providing for the recent contra decision on crossed cheques; for by making the cheque payable to order, and putting a penny stamp on it, you avoid the risk and chance of its being cashed by a *non bonâ fide* holder or bearer, as it must then bear the indorsement of the party to whom it is made payable before it can be cashed. This description of cheque appears to have derived its existence from the late act for regulating and governing the law of receipt and draft stamps for amounts above £2, and is in accordance therewith.

In answer to the question, I certainly think A. has been misinformed. W. HENRY RANGLES.

No. 53.—*Stamp—Bill or Draft* (*ante*, p. xxxii).

The advice given by A.'s solicitors was fallacious; the instrument is merely a draft on B.'s bankers, payable on demand, and as such requires a penny stamp. The mooter seems to attach some weight to the difference between the words "bearer" and "order," but this is non-important, as all we have to consider is whether such draft was payable "on demand" or not.

ROMAN CLIFFE.

NOTICES TO CORRESPONDENTS.

J. F. L.—We cannot give any precise answer as to the volumes of Sweet's Jarman. Many persons believe they never will appear.

LXX (Manchester).—A new edition of Stephen is announced, and perhaps you had better wait for it.

X.—Your articles are properly enrolled if they have been left at the Masters' office, and obtained therefrom indorsed.

P. M.—Yours arrived too late to enable us to avail ourselves of it this month.

E. W.—The "Key" contains all the Questions on Practice applicable to the existing practice, but not those relating to the old practice.

LIST OF CORRESPONDENTS.—The following are the only names to be added to the Lists at pp. x, 96, xx, 168, xxviii, xxxii, viz., R. H. Holloway, of Bilericay; Mr. John Williams, County Court Office, Carnarvon, North Wales.

ARREARS OF SUBSCRIPTIONS.

As the second Volume is now drawing to a close, we should now be obliged by payment of Subscriptions for that Volume. We are extremely anxious (for particular reasons) to have all arrears up to Christmas last settled, and we shall, therefore, be obliged if those who are in arrear (and we are sorry to say this the case with many hundreds) would settle up to that time at least, and so spare us the necessity for making application for the amount.

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ANSWERS TO MOOT POINTS.

No. 47.—*Filing assignment of Personal Chattels* (ante, pp. xxxi, xxxiv).

I beg to call your attention to a typographical error in my answer to Moot Point, No. 47 in last month's Chronicle. It there states "Registration is only necessary where there is no likelihood of the possession being retained by the assignor."

No should have been a, because where there is no likelihood of the assignor retaining possession of the goods assigned beyond twenty-one days from the execution of the deed, it is not necessary to file the bill of sale. FREDERICK SMITH.

No. 55.—*Merger* (ante, p. 275).

In this case I think no surrender is necessary, B's lease having merged in the immediate reversion (viz., A's lease). In order for a merger to take place, it is only necessary that "a greater and a less estate should meet in one and the same person" a predicament which here occurred on the assignment by A. to B. See Stephen's Com. vol. 1, pp. 303 and 305. W. Br.

No. 55. *Merger* (ante p. 275).

I am of opinion that B's term of twenty-one years will become merged in the larger term for this reason; B. by virtue of the assignment to him from A., has the immediate reversion for years, and an estate for years will merge in the immediate reversion though that be a chattel interest also. Steph. Com. 2nd edit. vol. 1, p. 302; Law Chron. ante, p. 235. FRED. SMITH.

No. 55.—*Merger* (ante, p. 275).

I think that B's lease for twenty-one years merges in the larger term, and that it is not necessary that a surrender of it should be executed by A. The acceptance of a new lease from the reversioner, at any time before the expiration of the old one, provided the commencement of the new lease be immediate, is a surrender in law, and leases of every kind might, previously to the 8 & 9 Vic. c. 106, have been surrendered by operation of law, and they may be so now, but all leases (when not surrendered by operation of law) require to be surrendered in writing. R. H. H.

No. 56.—*Sale by Cestui que trust under Will—Joinder of Trustees* (ante, p. 275).

I understand the question to be, that the children have all attained a vested interest, and that the mother is dead, and consequently they have become entitled in possession. But, the trustees do not appear to have conveyed the legal estate. Neither does it appear that a partition has been made. If this be so, I think the trustees are proper parties to the conveyance of one of the children's shares

proposed to be sold, a vendor being bound to deduce, both a legal, and equitable title to the property.

J. G. B. EDWIN.

No. 57.—*Annexation of Freeholds* (ante, p. 275).

In Herlakenden's case (4 Rep. 63, 64), it was decided by Lord Coke that wainscot fastened to the house by the lessee cannot be removed by him, and that it made no difference in law, whether the fastening be by great or little nails, screws or irons, put through the posts or walls, or in whatever other manner it was fastened to the posts or walls of the house. Such was the old common law rule, that whatever was once annexed to the freehold, could never be severed again without the consent of the owner of the inheritance; but this rule has been gradually relaxed. In Beck v. Rebow (1 P. Wms. 94), it was decided that the tenant might (amongst other things) carry away wainscot fixed only by screws. See also Lord Hardwicke's judgment in Lawton v. Lawton, 3 Atk. 13; and C. J. Gibb's judgment in Lee v. Ridson, 7 Taunt. 190.

Whether the tenant would be entitled to remove the lead, seems, therefore, to depend upon the mode in which it is affixed to the wall, if by nails, it would doubtless be considered as annexed to the freehold, and by removing it, the tenant would be liable to an action of waste. If fixed only by screws, it would appear from the authorities cited, that the tenant could remove it, but he would be liable to repair any injury the wall may sustain by the act of removal. I should certainly be of this opinion, but there is one other point which induces me to think, that even if the lead be fixed only by screws, yet the tenant is not entitled to remove it. It has been decided that a tenant is not allowed to take away erections, which might be considered as permanent additions or improvements of the estate (3 Esp. C. N. P. 11). True, the lead covering in question could not be defined to be an erection, yet, as the wall was very damp, and likely to be injurious to health, it would be considered as a permanent improvement to the property; and to pull it down would materially injure and disfigure the room. Upon this ground, therefore, I base my opinion that the lead covering however fixed, cannot be removed by the tenant. FREDERICK SMITH.

No. 58.—*Conveyance Stamp* (ante, p. 275).

I cannot see how the fact of the property being subject to an annuity or of the mortgages being paid off out of the purchase-money, affects the stamp. The only consideration for the conveyance is the £410, and whether this be paid to the mortgagees or the mortgagor, is of no consequence. The stamp will, therefore, be an *ad valorem* one on the £410. W. Br.

No. 58. *Conveyance—Stamp—(ante. p. 275)*

The sale being *subject to the annuity*, the duty only attaches to the actual purchase money, exclusively of the redemption price of the annuity, because the direction contained in the 55 Geo. 3, c. 184, Sched. Tit. conveyance, as to the duty payable on conveyances subject to mortgages, &c., does not apply to redeemable annuities (Jarman's Bythewood, vol. 7, p. 582). This direction not being altered by the present Stamp Act (13 & 14 Vic. c. 97) is incorporated in that act, by virtue of section 2.

Under these circumstances, therefore, it is quite clear, that the conveyance in question, will only require an *ad valorem* duty of £2 5s. upon the actual purchase money, £410; provided it be under thirty folios, if over that number, then of course, progressive stamps of 10s. each for every entire quantity of fifteen folios, over and above the first fifteen, will be requisite.

FRED. SMITH.

No. 59.—*Effect of the Insertion or Non-insertion of a Consideration in a Modern Assurance (ante, p. 275).*

The question propounded by Mr. Trotman in your last number as to whether on a conveyance from A. to B. in consideration of £20 without any use being declared, seems to me to admit of very little doubt, the answer being clear that A. comes in under the common law. The conveyance, which I suppose is by grant, operates by way of transmutation of possession vesting the legal seizin in the purchaser without requiring any aid from the Statute of Uses, which, so far as I can see, cannot, even if it were wished, be called into operation in this case, though even if it could still the purchaser would be in under the common law, according to the well-known rule, that when a conveyance is capable of operating both at common law and by virtue of the Statute of Uses, preference will be given to the common law operation (*Haigh v. Jagger*, 3 Exch. Rep. 54). The circumstance of the conveyance being for a pecuniary consideration, which seems to be relied on by Mr. Trotman, and to form the foundation of his opinion, does not appear to me to have the effect of causing the conveyance to operate under the Statute of Uses, for, if such were the case, the only seizin which could serve the use is that of the grantor, and then what difference remains between such a conveyance by grant and a bargain and sale? and why are not all such conveyances enrolled?—a ceremony which, supposing the conveyance to operate according to the suggestion made in the question, would, as appears to me, be clearly necessary. Moreover, if Mr. Trotman's position is correct, the validity of a conveyance in pursuance of the power contained in the dower uses for conveying the legal estate is questionable, for

such a conveyance operates as a declaration of a use which is served by the grantee's seizin; but if this seizin is only obtained by the aid of the Statute of Uses, then there is a use upon a use, which we all know to be prohibited, and this seems to be consistent with the view taken by Mr. Trotman himself in his question (No. 61), where he appears to consider that on a conveyance for valuable consideration from A. to B. in trust for C., C. takes the legal estate, which would certainly not be the case if the seizin vested in B. only vested in him by virtue of the Statute of Uses. In fact, the only effect of the expression of a valuable consideration in a conveyance by grant without a declaration of uses is of a negative character, viz., to prevent the use resulting to the grantor, which it otherwise would do (see Sanders on Uses, 208; Addison on Contracts, p. 12, 3rd edit.). In proof of this view of the case, I beg leave to refer to the following copy of a note by Mr. Hayes to the habendum of a simple conveyance without recital, from a vendor seized in fee to a purchaser expressed to be made in consideration of the payment of £5000. The habendum is in these words—"To hold the hereby assured premises unto the said Jane Franks (the purchaser) and her heirs to the use of the said Jane Franks, her heirs and assigns for ever." And here is a copy of a note—"Here as the use of the fee is limited to the releasee" (and the conveyance by grant has the same effect as that by lease and release; see 2 Hayes' Introduction, p. 23, 5th edit.) "herself she will be in at the common law. The limitation indeed has rather a negative than positive effect, excluding the intendment of a use in any other person. As, however, the releasee pays a valuable consideration, the use would not result to the grantor, and the omission of an express limitation of it to the releasee would not vary the effect of the conveyance" (Hayes' Concise Conveyancer, p. 84).

H. K. H.

No. 59.—*Uses—Insertion or Non-insertion of Consideration (ante, p. 275).*

B. takes, I think, at common law; for, under a conveyance by virtue of the statute, there must be one person seized to the use of another. Now, if in consideration of £20 A. conveys to B. without any declaration of uses, how is the statute complied with? Mr. Trotman says, if A., without consideration, conveys to and to the use of B., B. is in at common law, in which I fully agree; but I submit also, that if A., in consideration of £100 conveys to and to the use of B., B. is still in at the common law, there being no seizin of one person to the use of another. I find in Sanders on Uses and Trusts as follows:—"If a person be seized to his own use,

the statute will not execute it, it not being then a person seized to the use of another, but the cestui que use will hold at common law, and even on a limitation to A. and his heirs to the use of A. and his heirs the statute will not execute it."

JOSHUA T. BEARD.

No. 61.—*Construction of the Statute of Uses*
(ante, p. 276).

In this case, C. clearly takes the legal estate under the statute; B. is merely the conduit pipe for conveying the estate to him. J. G. B. EDWIN.

No. 62.—*Divorce a Vinculis Matrimonii—Whether it causes the revival of a Will made by a Wife before Marriage* (ante, p. 276).

The 22nd section of 1 Vic. c. 26 is express; consequently under the circumstances stated, A. must execute a fresh will or a codicil.

J. G. B. EDWIN.

No. 62.—*Divorce a Vinculis Matrimonii* (ante, p. 276).

This does not appear to me to be a case within s. 22 of the 1 Vic. c. 26. The marriage being void *ab initio*, the will was not revoked, and clearly stands good.

R. H. H.

No. 64.—*Limitation upon failure of Issue*
(ante, p. 276).

The language of this devise is very peculiar. But, I think, on careful consideration, the court would construe the intention of the testator to be, that C. takes an estate tail. The words, "and in case his son C. should die without living issue," certainly seem to favour such a construction. If C. has never any issue, I think he would only take a life estate.

J. G. B. EDWIN.

No. 64.—*Limitation upon a failure of Issue*
(ante, p. 276).

Before the late Wills Act, the words "should die without issue" were held to import an indefinite failure of issue, and as this will is dated in 1826, C. would take an estate tail. But from the insertion of the word "living" it would certainly appear that the testator intended the estate should go to B., if C. died without issue *living at his decease*. And I think the will should be construed accordingly.

W. Bt

COUNTY COURTS JUDGES' SALARIES.—Many strong observations have been made on the subject of the County Court Judges becoming beggars for increase of salaries, and it is hoped that a stop will be put to such unseemly practice.—The Lord Chancellor proposes to transfer the payment of the salaries to the Consolidated Fund instead of charging them upon the suitors, and the salaries are fixed at £1200, without prejudice to the present judges having a larger income.

NOTICES TO CORRESPONDENTS.

CAIUS.—We cannot insert your reply to "North Walian," for reasons which on reflection must be obvious to you. We must add that it is quite a mistake to suppose that he was the writer of the original communication.

W. E. H.—We are sorry we are not able to refer you to any authority.

STUDENT.—For bills of sale Mr. Beaumont's Work; for contracts, the late Mr. Smith's lectures, or Mr. Chitty or Mr. Addison's works; for landlord or tenant, Mr. Smith's work or Harrison's Woodfall; for Uses and Trusts, Sanders on those subjects; and for Powers, Sugden or Chance.

J. R.—The reference at p. 310, in the case of re Stanton Iron Company, should have been 26 Law Tim. Rep. 252. Our other readers will please note the mistake.

B. H. J.—On common law practice Kerr's work is useful, but the most complete is Chitty's Archbold by Prentice. On equity practice, the most practical is by Ayekbourn; for equity principles, Smith's Manual is very good, but the more complete works are Spence (2nd volume only) and Story.

J. H. L. J.—You will find, for commenting, Kerr, or Smith by Wise, very useful; also Stephen's Lush which contains something beyond mere practice.

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MOOT POINTS.

No. 69.—*Devise*—"My possessions."

A. B. made his will in January 1852, in the following manner:—"This is the last will of me, A. B., whereby I give and bequeath unto my wife Mary, the whole of my personal estate *together with all other my possessions*, and I order that my said wife shall pay all my just debts, funeral expenses, and charges of proving this my will. I appoint C. D. and E. F. executors of my will. Testator died in 1854, being at that time seised of real property of great value. Testator's widow has sold part of the real estate by private contract, but the purchaser's solicitor has made the following objection, viz., that the words in the will "*together with all other my possessions*," are not sufficient to pass the real estate and that, therefore, it will descend to the heir-at-law. Qy. are they sufficient to pass the real estate or not?

STUDENS.

No. 70.—*Variation of the Habendum from the Testament in a Deed.*

A. by his will bequeathed five leasehold messuages to B., C., D., E., and F. severally, giving each individual a distinct message, and appointed G. executor. Subsequently to A.'s decease the executor and legatees executed a deed of assignment (which appears to have been wholly unnecessary), whereby the said messuages were assigned to the legatees as follows:—In this manner in the testament—"The said G. in accordance with the bequests in the said will contained doth assign and transfer unto the said B., C., D., E., and F. their executors administrators and assigns. Firstly, all that message," &c. (describing one of the messuages). "Secondly, all that message," (describing another message), and so on giving the five messuages to the legatees jointly. In the habendum, again the property is limited thus:—"To hold the said message firstly described unto the said B. his executors administrator and assigns, to hold the said message secondly described unto the said C. his executors administrators and assigns," and so on specifically assigning in the habendum a distinct message to each individual.

Under these circumstances it is desired to be known how the legatees take under the deed? whether *jointly* or *severally*? Should the former be the case the concurrence of all the legatees is necessary to sell any part of the property. W.

No. 71.—*Registered Judgments.*

Do judgments registered in the Common Pleas of the County Palatine of Lancaster, and the Court of Pleas of Durham, bind property which is situated within these limits?

Mr. Wharton, in his *Principles of Conveyancing*, page 682, says that it is unnecessary to search in these courts, but the provisions of the 18 Vic. c. 15, seem to express the contrary to be the case.

Perhaps some gentleman, who may probably be resident within the districts to which I have referred, may know the practice on this point.

J. G. B. EDWIN.

No. 72.—*Devise—Limitation over in default of issue—Construction.*

In 1827, A. by his will gave and devised certain hereditaments and premises unto all and every the child or children of the body of his daughter E. the wife of J. S., his, her, or their heirs for ever, equally between them, if more than one as tenants in common, and not as joint tenants; and in default of such issue, testator gave and devised the said hereditaments and premises to G. H. his heirs and assigns for ever—E. died leaving two children. Does the limitation over in default of such issue, curtail the prior fee simple of the children to an estate tail?

FRED. SMITH.

No. 73.—*Landlord and tenant—Notice to tenant to quit part of premises demised.*

In 1854, A. demised to B. six allotments of land as a yearly tenant, at a rent of £40 per annum, payable half yearly. A. wishing to resume possession of one of the allotments, has given B. notice to quit the same—is such notice valid?

FRED. SMITH.

No. 74.—*Married Woman—Acknowledgments.*

By a mortgage, Elizabeth, a married woman, acknowledged the deed to the mortgagee, passing all her interest in the usual way. A transfer of this mortgage to which the first mortgagee (to whom of course, the conveyance and acknowledgment by Elizabeth was fully made) is a conveying party to the new mortgagee, is about to be executed. Will a second acknowledgment by Elizabeth to the new mortgagee be necessary? There is a further sum advanced, but by the transfer the first mortgagee conveys all that was vested in him by virtue of the first acknowledgment to the new mortgagee.

F. F.

No. 75.—*Perjury—Damages.*

At the last Dorset Sessions, Ellen swore to facts indicating an assault with intent to ravish her. The whole story was a fabrication, and as some of the circumstances were detailed by the girl on cross examination, it is apprehended that this makes it wilful and corrupt as the girl was cautioned before hand. At the trial the counsel for the prisoner alleged that he was prepared to convict the prisoner for perjury, whereupon by consent the

prisoner was discharged. Is the father of the prosecutrix liable in *damages* at common law, for the wrong done by his child, to the father of the prisoner, without first indicting her for the perjury.
F. F.

No. 76.—*Trespass—Actions for.*

A. invests a certain article which he sends to B. to be made. Before it is quite finished, C. comes into B.'s shop and takes away the article that B. is making, it is suspected with B.'s consent, and gets others made from it which he sells, thereby materially injuring A. A. has not yet taken out a patent, the article not being quite finished or put into A.'s possession. Has A. any remedy against C.? I presume not; and his only remedy, if any, will be to sue B. for damages. Can he do so, and if not, what course can A. take against B.? Also if A. can recover against B., can B. bring an action of trespass against C.?
C. N. ALLDRITT.

No. 77.—*Forged note—Action on.*

C. gives B. his housekeeper a cheque on the B. bank to pay the under-servants wages with. B. gives this cheque to T. to get changed for her. Where he changed it is not known, but amongst the change he brings back a £10 Bank of England note, and she requiring smaller change, gave T. the £10. note. He changed it at the B. Bank and next day brought her ten sovereigns. Two months afterwards H. B. the manager of the B. Bank wrote to B. to inform her that the £10 Bank of England note, which T. had changed for her there, was a bad one, and requested B. to refund the £10, this she, under the advice of her master, refused to do. T. does not know from whom he obtained the note. H. B. has proceeded against C. for the recovery of the note. C. knew nothing of the transaction between his housekeeper and T. and can urge in defence that B. was not his agent in changing the note; and as an agent cannot appoint an agent, T. cannot be the agent of C. On this ground, I think C. might obtain a verdict. Then proceedings will be commenced against B., which, of course, would be tantamount to recovering against C. Can B. defend the action? If she lose, she can proceed against T., but he is not worth it (*Jones v. Ryde*, 5 Taunt. 488, acted upon in *Gomberty v. Bartlett*, 2 E. and P. 849; and *Gurney v. Wormersley*, 4 E. and B. 133). I shall be glad to correspond with any gentleman on these two subjects.
C. N. ALLDRITT.

No. 78.—*Contingent Remainders.*

If an estate be limited to A. for life, with remainder to the unborn sons of C. in fee, and A. dies, C. has a right, as a contingent remainderman, to invest as a remainder during the particular estate, or as an estate in possession, at its determination,

and cannot remain in contingency after the latter period (*Steph. Com. Bk. 11, P. 315*), and as 8 & 9 Vic. c. 106, s. 8, appears to make provision only in cases of forfeiture, surrender, and merger, and not the death of the particular tenant. Are not, therefore, the issue of C. B., on or after A.'s decease entirely barred from any benefit under the limitation, and will not the estate so limited under the above circumstances, revert to the grantor?
A SUBSCRIBER.

No. 79.—*Will—Lunatic—Ademption.*

A. by his will has given all his household goods, farming stock, and the tenant right of his farm to B., his money, and the residue of his estate he has given to certain persons therein named. Since the making of his said will, A. has become lunatic, and it is the opinion of medical gentlemen of eminence that he will remain so for the remainder of his life, consequently, there is no probability of his altering his said will. The landlord of A., in consequence of his being from home, and in an asylum, gave a notice to quit the aforesaid farm, which obliged B. (who was managing it in the absence of the lunatic) to convert the subject of the specific bequest given to him as aforesaid into money, consequently, the same has ceased to exist by the description mentioned in the said will. B. has kept the money arising from such conversion of the said specific bequest separate from the other money belonging to the lunatic, and willed to other parties, and invested it for his (the lunatic's) benefit. B. is naturally anxious to secure to himself the aforesaid specific bequest if he can by any means do so, and although the sum set apart as aforesaid, will not answer the description of the bequest to B. in the said will, it is virtually the same. Would a court of equity take this view of it, should B. be driven there? It is believed all the residuary legatees under the said will (being well satisfied of the testator's intention) would assign all their interest in the said specific bequest (if B. should survive the lunatic), if such a deed could be prepared so as to be effectual. Could this be done?—having regard to the maker of the will being still living. I should be glad of the opinion of any reader of the LAW CHRONICLE on the above case, and the citation of any decided cases which may bear upon it, and as to the best mode for B. to act to insure to himself the said bequest.
G.

No. 80.—*Tenancy—Smoky chimnies.*

A. lets a house to B., who, on entering, suffers from the continual smoking of some of the chimnies. Canot B. give up his tenancy, after having complained to A., who neglects to remedy it?
VENATOR.

No. 81.—*Service of notice to quit.*

X. wishes to serve Z., a yearly tenant of orchard, who entered at Michaelmas, with a notice to quit. He meets Z.'s wife on the 24th March on the turnpike road, and serves and explains notice to her. Is this sufficient service, or must it be served at her house, or the premises leased to her husband?

VENATOR.

No. 82.—*Tenant in tail after possibility, &c.*

Tenant in tail may bar his issue, and all persons having any ulterior estate. But tenant in tail, after possibility of issue extinct, is for all purposes of alienation, considered merely as tenant for life. Why is this, and what is the reason for not allowing him to bar ulterior estates? See Co. Lit. 28 a, and 3 & 4 Wm. 4, c. 74, sec. 18. W. G.

NOTICES TO CORRESPONDENTS.

"JUSTICES OF THE PEACE" (*ante*, pp. 256, 298).

—B. H. S., who was the writer of the original article upon the above subject, informs us (which, however, was quite unnecessary, because we were fully aware of the fact) that *he was not the writer of the letter signed "North Walian," and he has not the most remote idea by whom that letter was written.* He adds that it must be obvious to us and to our readers why the communication of "Caius" has received no notice.

S. X. AND SOME OTHERS.—We think it is rather hard to charge us with any occult design in inserting the communication on the "Education of Articled Clerks." We certainly had great doubts about its insertion; and it was the feeling that we might be doing injustice by its exclusion that induced us to place it in our pages. We have now given insertion to one reply, and we think our correspondents should rest satisfied therewith. We agree that the alleged "drudgery" of the office is a foolish expression, for every articled clerk should go through the routine part of his profession, and rely, which he may safely do, on his merits and industry to relieve him therefrom as soon as he deserves.

W. G.—No. 15 is quite correct, and there is nothing in Burton to the contrary; the rule in Shelley's case does apply, but it is not necessary that the estate should be a fee; whether fee tail or fee simple depends upon the words "heirs" or "heirs of the body."

No. 65.—We have been inundated with answers to this moot point, which we have been obliged to put aside, as there is nothing in the point to justify so many answers being inserted.

A. B.—It will be found useful to a junior student, who is only commencing study. There is not any

lending law library. When you come to town you can gain access to the Law Institution library.

ANSUS.—Mr. Forsyth on Composition, 3rd edition, lately issued, is a good work. The price is 9s.

W. S. C.—We have no recollection of any previous letter. 1. If the clerk will attain twenty one in the course of the same term, he may be examined; 2. if the articles expire in the same term, the clerk may be examined, by leave obtained from the examiners. Communicate with the secretary to the Law Institution, who also acts for the examiners.

SPECIFIC PERFORMANCE AT COMMON LAW.—The Court of Queen's Bench has confirmed the reasoning in 1 Chron. 317, 318, that a mandamus for specific performance of an agreement cannot be issued at common law, so that specific performance is not a common law remedy. We shall notice the case and decision in next No.

ANOTHER BREAK-UP IN THE PROFESSION.—It is now becoming a very serious matter that so many cases are happening of solicitors failing and involving their clients and others in ruin. The cases of the Walfords, with some others in the country, are fresh in memory when comes that of another, holding large and generally considered profitable offices. It is time some measures were adopted to prevent such scandals, and it becomes every member of the profession to see to it.

SUBSCRIPTIONS.

The subscription for Vol. I. (Nos. 1—13) is £1 2s. and we shall be obliged by the amount being forthwith remitted. The subscription for the current volume (Nos. 14—25) is £1, if *pre-paid*; if not *pre-paid* it will, as in the case of vol. I., be £1 2s. We should prefer *pre-payment* of subscriptions, and as it is an advantage to our subscribers we trust they will for the future adopt the *pre-payment* plan. Post Office Orders should be made payable at the STRAND Post Office, to our publisher, MR. THOMAS DAY, of No. 18, Carey Street.

ARREARS OF SUBSCRIPTIONS.

As the second volume is now drawing to a close, we should now be obliged by payment of Subscriptions for that volume. We are extremely anxious (for particular reasons) to have all arrears up to Christmas last settled, and we shall, therefore, be obliged if those who are in arrear (and we are sorry to say this is the case with many hundreds) would settle up to that time at least, and so spare us the necessity for making application for the amount.

Printed and published by THOMAS F. A. DAY, at his residence, No. 13, Carey-street, Lincoln's-inn-fields, in the parish of St. Clement Danes, in the county of Middlesex. — Thursday, May 1, 1856.

The Law Chronicle.

No. 25—Vol. II.

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PROFESSIONAL NEWS.

THE STATUTE LAW COMMISSION.—This commission whose report we lately noticed (*ante*, pp. 349-352), does not appear to be viewed with much favour in many quarters. The Jurist concludes an article in a late number thus: "These two stale suggestions are the visible fruits of the Statute Law Commission since the 10th July, 1855. We hear, indeed, rumours of a powerful flotilla of 'consolidation bills' nearly ready to be launched—not, however out of the commissioner's yard, nor even from that of the paid commissioners, but prepared by a variety of private artists, who are said to be grumbling as loudly at the shabby remuneration they receive, or hope to receive, for this most difficult and important work, as the treasury is at the collective amount of the demands thus thrown upon it by the commissioners who profess so much and do so little."

THE INNS OF COURT DESCRIBED.—In Mr. Mayhew's "Great World of London," some account is given of the Inns of Court, and we find it stated that "the Inns of Court are themselves sufficiently peculiar to give a strong distinctive mark to the locality in which they exist; for here are seen broad open squares like huge court-yards, paved and treeless, and flanked with grubby mansions—as big and cheerless-looking as barracks—every one of them being destitute of doors, and having a string of names painted in stripes upon the door posts, that reminds one of the lists displayed at an estate-agents' office, and there is generally a chapel-like edifice called the 'hall,' that is devoted to feeding rather than praying, and where the lawyerlings 'qualify' for the bar by eating so many dinners; and become at length—gastronomically—'learned in the law.' How odd, too, are the desolate-looking legal alleys or courts adjoining these inns, with nothing but a pump or a cane-bearing street-keeper to be seen in the midst of them, and occasionally at one corner, beside a crypt-like passage, a stray dark and dingy barber's shop, with its seedy display of powdered horsehair wigs of the same dirty white hue as London snow. Who, moreover, has not noted the windows of the legal fruiterers and law stationers hereabouts, stuck over with small announcements of clerkships wanted, each penned in the well-known formidable straight-up-and-down three-and-four-penny hand, and beginning—with a "THIS INDENTURE" like flourish of German text—"THE WRITER HEREOF," &c. Who, too, while threading his way through the monastic-like byways of such places, has not been startled to find himself suddenly light upon a small enclosure, comprising a tree or and a little circular pool, hardly bigger than a

lawyer's inkstand, with a so-called fountain in the centre, squirting up the water in one long thick thread, as if it were the nosel of a fire engine."

SATURDAY HALF-HOLIDAY.—The following is the rule of the Common Law Courts, as to the Saturday Half-holiday, and respecting which so much has been said as furnishing a decided precedent for the more general adoption of that movement:—"It is ordered, that in lieu of rule 164 of the Practice Rules of Hilary Term, 1853, the following be substituted:—'Service of pleadings, notices, summonses, orders, rules, and other proceedings shall be made before seven o'clock P.M., except on Saturdays, when it shall be made before two o'clock P.M. If made after seven o'clock P.M. on any day except Saturdays, the service shall be deemed as made on the following day; and if made after two o'clock P.M. on Saturday, the service shall be deemed as made on the following Monday.'"

THE BUSINESS OF THE TERM.—The present Trinity Term commenced with a considerable increase of arrears, consequent upon the short vacation and the few sittings after last term. The total is 132. In the Queen's Bench the new trial paper shows two rules for judgment and twenty-three for argument; the special paper, three for judgment and seven for argument. The Common Pleas has four demurrers, two enlarged rules and seventeen new trials. In the exchequer are seven rules in the peremptory paper, three in the special paper for judgment, and sixteen for argument; and in the new trial paper, three for judgment and twenty-five for argument.

BILLS OF EXCHANGE AND PROMISSORY NOTES.—By the Mercantile Law Amendment Bill, it is provided that a bill of exchange or promissory note, although not made payable to bearer or to order, is to be negotiable, unless an intention that it shall not be so shall be expressed on the face of it. No acceptance of a bill of exchange, inland or foreign, is to be binding, unless it be written upon the bill and signed by the acceptor or his agent. The presentment of a bill, if without date to the drawee for acceptance or payment, shall, on dishonour, be an assignment to the payee or holder of any debt or money due or owing to the drawer from the drawee at the time of such presentment, to the amount of the sum for which the bill is drawn, with interest and costs, and this right is to be transmissible with the bill to each indorsee or holder for the time being and to be enforceable in all courts of law and equity. But the payee or holder is to be liable to all defences and objections, including set-off either at law or equity, which the drawer would have been liable to, as in a question with the drawee, at the time of presentment.

MOOT POINTS.

No. 83.—*Application Order—Arrears—Pauper.*

A. B. a poor woman, obtains an application order of 1s. 6d. per week upon C. D. Several payments are made under it, but subsequently the woman is compelled to seek parish relief, and obtains an order for admission in the union house, where she remains for a long period without any payment being made by C. D.

Quære. Is she entitled to recover of him the amount to which the weekly payments would come to, or if not, are parish officers, or is any body else entitled to it? STUDENS.

No. 84.—*Charge upon Real Property.*

G. H., being possessed of real estate, upon which he has a mortgage of £200, makes his will, whereby he gives the estate (without mentioning the mortgage) to his sons in fee.

Quæry. Are the executors bound to discharge the mortgage debt as a debt of the testators, or does it remain a charge on the estate, to which the sons become liable upon taking possession of the property? LEX.

No. 85.—*Power of Appointment.*

A. being seized of an estate in fee simple, and having a concurrent power of appointment in fee, makes a lease to B. (carved out of the estate which he has independently of the power), A. soon afterwards, and before the expiration of the lease, appoints to C. in fee. Will C. (considered as taking under the instrument by which the power was created) be bound by A.'s covenants with B.?

A. L. TROTMAN.

No. 86.—*Advwosons descending to Coparceners.*

An advowson descends to A., B., and C. as coparceners. A. seems to be entitled to present on the first vacancy, and the others according to seniority on the next vacancies. Does the advowson become absolutely vested in the survivor, or will the heirs of the several coparceners be still entitled to present in the same order as the ancestors, whom they represent?

A. L. TROTMAN.

No. 87.—*Rule against perpetuities, as applied to powers of Revocation and new appointment*

The rule against perpetuities seems to require, that, in the creation of a power of revocation and new appointment, the period should be assigned within which it must be exercised. Upon a settlement to A. for life, remainder to B. in fee, is a power to C. and his heirs to revoke the uses, valid? The master thinks not, as its duration is thus left indefinite.

A. L. TROTMAN.

No. 88.—*Legacy—Legatee minor, Abroad—Executor investing Legacy.*

A. a minor, and who is now residing in America, became entitled to a legacy of £200 under the will of B., in the month of March last. Under the above circumstances, G. the executor under the will has invested the legacy in a savings bank until A. attains his majority. Is he justified in so doing?

FRED. SMITH.

No. 89.—*Bequest of Debts—Legacy Duty.*

In 1823, A. by his will gave and bequeathed unto B. £200 and £300, due and owing from B. to him, the former upon a mortgage of certain real estate, and the latter upon a promissory note. Are such bequests liable to legacy duty?

FRED. SMITH.

THE PROPERTY OF MARRIED WOMEN.—In a report of a committee of the Law Amendment Society, respecting the property of married women, there is the following statement respecting the marriage laws and rules of property being derived from Rome and Germany. "The rules which regulate the enjoyment of property by married women in Europe are clearly traceable to two distinct sources—Rome and Germany. Those nations, though under very different conditions of civilisation, were probably the first in the ancient world to place the institution of marriage on its proper basis, namely, the perpetual consort of one man with one woman for life, both parties having common interests and equal rights dealt out to them by law. The Greeks, retaining or imitating the customs of the East, secluded their wives in harems, and, bringing them up in ignorance, sought the charms and solace of cultivated female companionship in the *Aspasia*s and *Phrynes* of the day. The Jews, during the historical period, maintained the practice of polygamy till late in the Christian era, when it was abolished by the Emperors Theodosius and Arcadius, who prescribed the Roman system of monogamy; though we learn from Selden's "*Uxor Ebraica*," that it still prevailed among them during the sixteenth century in Italy and Hungary, as it does even now in India.

LAW LECTURES.—Mr. Reginald Robert Walpole the Reader or Lecturer on the Law of Real Property, at Gray's Inn, has signified his intention to resign his office in July next. The society is now about to appoint his successor who must be a barrister.

NOTICES TO CORRESPONDENTS.

MOOT POINTS.—Several answers arrived too late for insertion this month. We have no wish to discourage our correspondents, but it would be very desirable if they could come to some arrangement as to the distribution of the moot points among themselves, for at present we receive 30 or 40 answers to some of the points, especially the easy ones, and none at all to some others. We must put in force our regulation as to the insertion of two answers only, otherwise we shall get into trouble with our readers.

. We wish we could recommend such a set of reports, but that is impossible; a good selection of the best cases would be useful, but we almost doubt whether the profession would give it sufficient encouragement. Perhaps a set of the Law Journal Reports would meet your requirements, and a second hand set can be had for a comparatively reasonable sum, though few students would be willing to make the purchase.

C. H.—We think you would be admitted a member. Write to the secretary at the Law Institution.

M. J. T.—We do not know when the other vols. of Davidson will be out. We believe there will be four volumes. It has a good reputation, in fact, the very best. We know nothing of the other work you refer to, as it is not used in London.

A. L. T.—The library was discontinued on account of its not being properly supported. We have had some thoughts of recommencing it, but with a different series of works, such as would be more likely to be purchased by articulated clerks. Perhaps a series of volumes containing questions and answers on the most important branches of the law would be acceptable. The method of questions and answers is one easy to the reader, and acceptable to those who are unwilling or unable to engage in abstruse topics and long argumentative discourses. We should like to have the opinion of some of our readers as to what they think would be useful to articulated clerks, and then we could consider the matter and decide upon some measure.

LEX (Birmingham).—You must wait till Michaelmas Term next.

COUNTY COURT BILL.—Some material amendments have been made in the bill, which do not appear to be very great improvements, except in the eyes of those who are anxious to see the county courts absorb all the primary jurisdiction in civil causes.

SUBSCRIPTIONS.

The subscription for Vol. II. (Nos. 13—25) is £1 2s. and we shall be obliged by the amount being forthwith remitted. The subscription for the current volume (Nos. 26—37) is £1, if *pre-paid*; if not *pre-paid* it will, as in the case of vols. I. & II., be £1 2s. We should prefer *pre-payment* of subscriptions, and as it is an advantage to our subscribers we trust they will for the future adopt the *pre-payment* plan. Post Office Orders should be made payable at the STRAND Post Office, to our publisher, MR. THOMAS DAY, of No. 13, Carey Street.

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STATUTE OF FRAUDS—GUARANTEES.—In Sir F. Kelly's bill for amending the law of evidence and procedure, another attack is made on the doctrines arising out of the statute of frauds, besides that noticed *ante*, p. 348, it being proposed to be enacted that it shall be no longer essential that the consideration for a guarantee should appear upon the face of the writing, neither need it appear in the case of a promise by an executor, or an administrator to answer damages out of his own estate.

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